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No. 1866

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE NINTH CIRCUIT.

APOSTLES.

(In Three Volumes.)

THE NORTH AMERICAN DREDGING COMPANY (a Corporation), Claimant of the Steam Dredge "PACIFIC," Her Engines, Machinery, Boilers, etc., (Libelee), Appellant,

vs.

THE PACIFIC MAIL STEAMSHIP COMPANY (a Corporation), (Libelant), Appellee.

VOLUME III.

(Pages 769 to 1130, Inclusive.)

Upon Appeal from the United States District Court for the Territory of Hawaii.

FILMER BROS. CO. PRINT. 330 JACKSON ST., S. F., CAL.

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(Testimony of Jimmie Thompson.)

Q. Where did the launch take you?

A. Over to the dredger.

Q. What did you do then? [205]

A. I stayed on it.

Q. What did the launch do after it got to the dredger? A. I don't know.

Q. You don't know what the launch did? Where did it go to after it got to the dredger?

A. It came back and went to the Bishop slip.

Q. Then where did it go? A. I got off.

Q. Where did you go next?

A. Over to the Boat Club again.

Q. Where did you go next?

A. By and by the launch came around again and I got on it again.

Q. Then were did the launch go?

A. Over to the dredger.

Q. Then were did it go?

A. It got a bundle of floats,—pontoons.

Q. And where did it go with the pontoons?

A. Towed it over towards the "Restorer," I think.

Q. Were you on the launch when it towed it over?

A. Yes.

Q. What was on the pontoon?

A. A lot of wire.

Q. Who was on the pontoons?

A. Some men.

Q. Where did the launch in towing the pontoons over stop? A. I forget where it stopped.

Q. Do you know any other boat around there be-

(Testimony of Jimmie Thompson.)

sides the "Restorer" in that direction?

A. I think the "Mokulii" was out there.

Q. Did the launch stop Ewa or Waikiki of the "Mokulii"? A. I forget. [206]

Q. Did you know at that time of any buoys in the harbor? A. Yes.

Q. Did the launch go to any buoys?

A. Yes.

Q. Where was the buoy, this side or the other side of the "Mokulii"? A. I forget.

Q. Do you remember whether you passed the "Mokulii" in going to the buoy? A. No.

Q. In going from the dredger with the pontoon to where she took the pontoon, did you pass through deep or shallow water?

A. Passed through deep water.

Q. In coming from the buoy back to the dredger did you pass through deep or shallow water?

A. I think we passed through deep water.

Q. Did anybody on the pontoon get out and wade either going or coming back? A. No.

Q. Did anybody push the pontoon with a pole either going out or coming back? A. No.

Q. Are you the little boy that was knocked off into the water? A. No.

Q. Who was? A. Paul.

Q. Paul? A. Paul Schulte.

Q. What was it knocked him off, do you know?

A. No; I think it was a rope.

Q. A rope knocked him off. Do you know what he did?

(Testimony of Jimmie Thompson.)

A. He climbed out again and got into the launch.

Q. Do you know whether he struck bottom when he went into the water? [207] A. No.

Q. Did he, or did he not?

A. He couldn't, I don't think; he couldn't, it was deep water there.

Mr. McCLANAHAN.—That's all.

Mr. FRANK.—No questions. [208]

[Testimony of George Cassidy, for Libelants.]

GEORGE CASSIDY, called as a witness on behalf of libellants, being duly sworn, testified as follows:

Direct Examination.

Mr. McCLANAHAN.—Question. What is your name, George? A. George Cassidy.

Q. Where do you live? A. Waikiki.

Q. How old are you? A. 12 last October.

Q. Where do you go to school?

A. The High School.

Q. In Honolulu? A. Yes, sir.

Q. Do you remember when the dredger "Pacific" was in Honolulu? A. Yes, sir.

Q. Do you remember Visitors' Day on the "Pacific"? A. Yes, sir.

Q. Where were you on Visitors' Day?

A. I worked at my father's store in the morning, and in the afternoon I went to the dredger.

Q. How did you go on the dredger?

A. On the launch "Pearl."

Q. After you went on the dredger, where did you go to?

(Testimony of George Cassidy.)

A. From the dredger we got on the launch.

Q. What do you mean when you say "we"?

A. Me and Willie Boyd.

Q. Do you know where Willie Boyd is now?

A. In Waialua.

Q. When you got on the launch, where did you go to?

A. You mean when we went to the boat?

Q. I understood that you went to the dredger and then got on the launch, where did you go?

A. We went with them and they towed a barge across the bay? **[209]**

Q. Who towed the barge?

A. The launch did.

Q. And where was the barge when the launch took hold of it? Where was the barge when you first saw it?

A. When I first saw it it was on the side of the dredger.

Q. What was on the barge? A. Wire.

Q. Who was on the barge? A. The men.

Q. Where did the launch take the barge to?

A. Across the harbor to the buoy.

Q. What buoy?

A. Where they tied the wire.

Q. Where is that buoy located, George?

A. Right near a sailing vessel.

Q. Do you remember the "Mokulii"?

A. Yes, sir.

Q. Was it on the Ewa or the Waikiki side of the "Mokulii"? A. Ewa side.

(Testimony of George Cassidy.)

Q. Going over from the buoy to the dredger, was the water deep or shallow that you passed over?

A. Deep.

Q. Did you go back with the launch to the dredger or towards the dredger? A. Yes, sir.

Q. Did you tow the pontoon back?

A. Yes, sir.

Q. Was the water deep or shallow water going back where you passed over; deep or shallow water going back? A. Deep, I think.

Q. George, did you see anybody on the pontoon, any of those men on the pontoon get out and push the pontoon? **[210]** A. No, sir.

Q. Did you see any men get off and wade either going or coming? A. No, sir.

Cross-examination.

Mr. FRANK.—Question. Look here, George; were you playing around down in the bed of this launch when you were going out? A. Yes, sir.

Q. And looking at the engines?

A. Yes, sir.

Q. And talking to the other boys?

A. Yes, sir.

Q. You weren't paying very much attention to what else was going on, were you?

A. Not very much; no.

Q. You said this buoy was near a sailing vessel?

A. Yes, sir.

Q. How near to the sailing vessel?

A. Well, I don't remember about the sailing vessel.

(Testimony of George Cassidy.)

Q. Was it very close up to the sailing vessel?

A. I wouldn't say.

The COURT.—Could you say how far, looking out of the window, as far as from you to something out there?

A. I don't remember how far it was.

Mr. FRANK.—Q. You are sure the sailing vessel was there?

A. There was a sailing vessel there, because the launch ran into the sailing vessel.

Q. Right near the buoy? A. Yes, sir.

Q. And that sailing vessel wasn't the "Mokulii" was it? A. No, not the "Mokulii."

Q. Do you know the "Mokulii"?

A. Yes, sir.

Q. Do you know the name of the sailing vessel?

A. No, sir.

Mr. FRANK.—That's all.

Mr. McCLANAHAN.—That's all. **[211]**

[Testimony of Ralph Harrub, for Libelants.]

RALPH HARRUB, called as a witness on behalf of the libellants, being duly sworn, testified as follows:

Upon the request of Mr. Frank, the Court examined the witness upon his qualifications.

Direct Examination.

The COURT.—Do you understand now what you did when you said "yes" to the clerk's remark?

A. Yes, sir.

Q. What was that, an oath, swearing, an oath wasn't it? A. Yes, sir.

(Testimony of Ralph Harrub.)

Q. Well, of course, a boy is expected to tell the truth outside of the courtroom and inside of the courtroom it is very important that they tell the truth if they say anything at all. After swearing as you have done, if they tell what is not true, what they know is not true, then they are punished for it. If they cannot answer a question because they don't know they have a right to say that they don't know. They don't have to tell anything that they don't know. Sometimes witnesses are asked a question and have heard enough to give an answer. They answer because they have heard something, but that is not what the Court wants. When a witness is testifying, they want what the witness knows himself, what he sees, so if anybody told you something and you knew it that way, the Court don't want that evidence. The Court wants what you saw yourself.

Mr. McCLANAHAN.—What is your name?

A. Ralph Harrub.

Q. Where do you live?

A. 1049 Beretania Street.

Q. How old are you, Ralph? A. 12.

Q. What school do you go to?

A. Punahou.

Q. Do you remember when the dredger "Pacific" was dredging in Honolulu Harbor? **[212]**

A. Yes, sir.

Q. Do you remember Visitors' Day?

A. Yes, sir.

Q. Where were you on Visitors' Day?

A. At the Healani Boathouse.

(Testimony of Ralph Harrub.)

Q. Who was there?

A. Paul and Jimmie Thompson and myself.

Q. Did you go over to the dredger "Pacific" that day? A. Yes, sir.

Q. On what? A. On a launch.

Q. Where did you go from there?

A. Over to the buoy lying on the Ewa side of the "Mokulii."

Q. How did you get over there?

A. On a launch.

Q. Did the launch tow anything over there?

A. Yes, a barge.

Q. Do you know what was on the barge?

A. Some cable.

Q. Who was on the barge?

A. Some men from the dredger.

Q. Where was the barge when the launch hooked on to it?

A. On the Ewa side of the dredger.

Q. Was the water in going from the dredger to the buoy deep or shallow? A. Deep.

Q. Where after you left the buoy did the launch take you?

A. Oh, it took us back and then they stopped every once in a while to fasten the cable and then one time they stopped a long stop, and then the three of us jumped in the water and swam to the boat-house float.

Q. Where were they when they made this long stop?

A. I think they were about, I guess, between the

(Testimony of Ralph Harrub.)

dredger and the lighthouse.

Q. Now, did the launch tow back the pontoon from the buoy? **[213]** A. Yes, sir.

Q. Was the water deep or shallow in the course that you went over from the buoy back towards the dredger? A. No, sir, it was not.

Q. Was it deep or shallow? A. Deep.

Q. Did you see anyone from the pontoon when they were going over to the buoy get out and wade?

A. No, sir.

Q. Or push the pontoon? A. No.

Q. Going back did you see anyone do that?

A. No, sir.

Q. Do you remember the first time you came to my office? A. Yes, sir.

Q. Why did you come?

A. Because we heard about the "Siberia" picking up—

Q. What made you come?

A. Frankie Auerbach told us in school you wanted to see us.

Q. Do you know how he knew that?

A. I don't know.

Q. When is your birthday?

A. The 11th of November.

Q. Was this visit to the dredger before or after your birthday? A. Before my birthday.

Cross-examination.

Mr. FRANK.—Question. How long before?

A. About a week.

(Testimony of Ralph Harrub.)

Q. Now, you little boys were playing around together in the lowest part of that launch, were you?

A. In the back, right by the engines.

Q. And you were watching the engines together?

[214]

A. Yes, and then we were watching the water.

Q. Watching the water, and talking to each other and fooling around there like little boys would?

A. Yes.

Q. You weren't paying any particular attention to anything, were you? A. Not particularly.

Q. You weren't paying any attention to the water, or the depth of the water, or anything like that? A. I know the water wasn't shallow.

Q. How do you know?

A. I could see it going over by the Island. I was watching the water near that Island,—we were watching the water.

Q. Right by the Island you were watching the water? A. Yes, sir.

Q. How near were you to the Island?

A. I think about 50 feet away from it.

Q. About 50 feet away from the Island?

A. Yes, sir.

Q. What were you watching the water for?

A. Just looking.

Q. How were you watching it, looking over the top of it that way?

A. Looking down into it.

Q. You saw the bottom, didn't you?

A. No, we didn't see the bottom.

(Testimony of Ralph Harrub.)

Q. Are you sure you didn't see the bottom?

A. Yes, sir.

Q. What makes you so sure of it, now, this long time after? A. Because I can remember.

Q. Because you can remember?

A. Yes, sir. **[215]**

Q. How many times did you look into the water?

A. Five or six times.

Q. Where at? A. Right near the Island.

Q. What made you look at it near the Island and not anywhere else?

A. Well, I don't know just why we did.

Q. Did anybody tell you anything about any question concerning the depth of the water near the Island? A. No, sir.

Q. When you went over there did you see a sailing vessel near the buoy? A. Yes, sir.

Q. How close to the buoy?

A. Well, I don't know, about, I guess, 15 or 20 feet.

Q. 15 or 20 feet from the buoy? A. Yes.

Q. Were you looking at the engines of the launch when you were going away from the buoy over this way? A. Yes, sir.

Q. Do you know about how long you were looking at those engines? A. No, I don't know.

Q. Can you give us any idea?

A. I guess about five minutes.

Q. Only about five minutes? A. Yes, sir.

Q. What were you doing the rest of the time?

A. Looking towards the boathouse.

(Testimony of Ralph Harrub.)

Q. Do you mean the boathouse over at the Bishop slip where you went swimming?

A. Yes, sir.

Q. And that accounts for nearly all of your time coming back **[216]** from the buoy; is that right?

A. Yes, sir.

Mr. FRANK.—That's all.

Mr. McCLANAHAN.—That's all.

(At this point recess was taken and the hearing of the above cause was continued until 2 P. M.) **[217]**

AFTERNOON SESSION.

March 19, 1907.

[Testimony of P. J. Monaghan, for Libelants (in Rebuttal).]

P. J. MONAGHAN, called as a witness for libellants, in rebuttal, having previously, to wit, in the main case of the libellants, been sworn, testified as follows:

Direct Examination.

Mr. FRANK.—This witness was already on the stand. Is this the same witness that was on the stand yesterday?

Mr. McCLANAHAN.—Q. Mr. Monaghan, when your launch towed that pontoon from the dredge to the buoy #2, when it was towing from the dredge to buoy #2, did you pass in your course over deep or shallow water? A. Deep water.

Mr. FRANK.—This is subject to our objection, if your Honor please. I would like to know also what this is, whether it is the principal case or rebuttal. The witness was on the stand once before?

(Testimony of P. J. Monaghan.)

Mr. McCLANAHAN.—The witness was on the stand in our main case.

Mr. FRANK.—This is rebuttal?

Mr. McCLANAHAN.—Yes.

The COURT.—Do I understand that he is on, as he was before, on the re-opening of the case?

Mr. McCLANAHAN.—Now we are putting him on in rebuttal.

Mr. FRANK.—We object to it, as not proper rebuttal testimony.

The COURT.—Overrule the objection.

Mr. FRANK.—Exception.

Mr. McCLANAHAN.—Q. Deep water?

A. Yes, sir.

Q. In taking this course did you pass Young Brothers' Island? A. I did.

Q. How far was Young Brothers' Island on your port quarter?

A. A matter of probably fifty or sixty feet; something like that, probably a little more. **[218]**

Q. And in passing from the buoy on the return trip, did you pass through deep or shallow water?

A. Deep water.

Mr. McCLANAHAN.—That's all.

Mr. FRANK.—No questions. **[219]**

[Testimony of Captain Campbell, for Libelants (in Rebuttal).]

Captain CAMPBELL, called as a witness for libellants, in rebuttal, being duly sworn, testified as follows:

Direct Examination.

Mr. McCLANAHAN.—Q. What is your name?

A. C. J. Campbell.

Q. How old are you, Captain?

A. Fifty-four.

Q. What is your residence? A. Honolulu.

Q. What is your business?

A. Manager for the Inter-Island Ship Chandlery Department.

Q. Where did you get your title of captain; have you followed the sea? A. Yes, sir.

Q. For how long?

A. Fifteen or sixteen years master.

Q. How long have you been connected with the Inter-Island Steam Navigation Company's ship chandlery department?

A. With the Inter-Island about a little over two years, with the Inter-Island.

Q. Prior to that had you been connected with, had you been engaged in the shipping business?

A. Yes, sir.

Q. Who for?

A. Prior to that I was engaged with the Wilder Steamship Company, also in the ship chandlery department.

Q. Are you familiar with the character of goods

(Testimony of Captain Campbell.)

carried by the Inter-Island Steam Navigation Company in its chandlery stores? A. I am, sir.

Q. I hand you Libellant's Exhibit 8, and ask you if you know what that is? A. Yes.

Q. What is it? A. Wire rope clamp.

[220]

Q. Is that carried in your stock? A. It is.

Q. Was it carried in the stock of the Inter-Island Steam Navigation Company's Chandlery Department in November, 1905?

A. We have always had them in stock.

Q. This character?

A. That kind; I don't know whether we had that particular kind of stock on hand at that date, I couldn't say; our books would show whether we had it on that date or not.

Q. What is your best recollection about it?

A. We generally carried them on stock at all times.

Q. What is that iron, Captain, is it different, is it malleable, cast, or what?

A. It is cast, the upper part; the other is malleable iron.

Mr. FRANK.—Objected to as immaterial, and ask that the answer be stricken out.

The COURT.—I will let it stay in until we see what it is leading up to.

Mr. McCLANAHAN.—Q. Can these two metals be broken, Mr. Campbell?

Mr. FRANK.—Object to it as immaterial.

The COURT.—It seems to me it is not rebuttal.

(Testimony of Captain Campbell.)

It might be testimony that could be put on in a cross-examination, but there has been no testimony as to the character of the metal, and I don't see what it rebuts.

Mr. McCLANAHAN.—It rebuts the inference which has been made in the defense, which is that we fouled a wire in such a way as to make it impossible for us to have fouled on our shaft, on the outer wraps, a broken shackle of that kind. To rebut the evidence from which they want an inference to be drawn by the Court.

(Here followed argument by counsel for both sides.)

The COURT.—I will allow the testimony to go in, subject to a ruling on it later.

Mr. FRANK.—We will note an exception at this time; it is understood **[221]** it is going in now. Unless your Honor expressly orders it stricken out the ruling and the exception stands?

The COURT.—Yes.

Mr. McCLANAHAN.—Answer the question; when you say the upper part you refer to the base?

A. What you showed me, yes.

Q. And the shoulder is malleable? A. Yes.

Q. Can these two metals be broken?

A. Of course they can be broken.

Q. I hand you Libellant's Exhibit 2, and ask you if such a shackle of similar make was kept in your stock in November, 1905?

Judge STANLEY.—Is it understood that our objection runs to all this, and the exception is al-

(Testimony of Captain Campbell.)

lowed?

The COURT.—Yes.

A. I couldn't swear to the shackle, but similar to it.

Q. Is that a large or a small shackle?

Mr. WATSON.—Objected to on the ground that it is self-evident.

The COURT.—It is a question of comparison.

Mr. McCLANAHAN.—Q. With the trade is that a large or a small shackle? A. Medium size.

Q. Now, Mr. Campbell, how are the pins that are used in that shackle made fast or fastened to the shackle?

Mr. FRANK.—Object to that, as there is no evidence that this is the shackle that we used, or that it is in anywise the kind of shackle we used, with reference to pins. The direct testimony here is uncontradicted that the pin was put in in a particular way. Object to it as not tending to rebut anything in this testimony.

Mr. McClanahan argues.

The COURT.—Your question is what kind of pin is generally used with shackles of that size?

Mr. McCLANAHAN.—Yes, but I am not going to drop it there; I am prepared [222] to show that if a nut is used on a shackle of that kind it is a shackle specially made, and not a stock shackle.

Mr. FRANK.—Objected to as that is not rebuttal, and doesn't tend to disprove anything here testified to.

The COURT.—Overrule the objection.

(Testimony of Captain Campbell.)

Mr. FRANK.—Exception.

A. With a key, as a rule.

Q. Why do you limit your answer by saying "as a rule," Captain, explain that?

A. There is two different kinds of keys that can go into that; one may be a long and the other is a round pin. The two are carried in stock.

Q. And that is what you meant by limiting your answer? A. Yes, sir.

Q. Will you explain to the Court what you mean by a key, taking this Libellant's Exhibit #2?

A. (Showing by putting pencil through holes in shackle.) This is the bolt that goes through in this shackle. It extends out, there is a head on one end and it extends out and there is a hole in this end (pointing) which a key goes in, which you spread out, to keep this part from coming out. In others there is a bolt with a small hole with a pin. The other would be a key.

Q. Do you know the kind of shackles where the pin is fastened with a nut on the outside, working in a thread on the pin itself?

A. We don't keep them in stock; they can be used, they can be made and used.

Q. Do you know whether they are manufactured and kept by the shippping houses?

Mr. FRANK.—Shipping houses where? We object to the question on the ground that it is indefinite.

Mr. McCLANAHAN.—Withdraw the question.

Q. Captain, I hand you Libellant's Exhibit 1,

(Testimony of Captain Campbell.)

and ask you if you know the size of that wire? **[223]**

A. One inch diameter.

Q. Do you remember measuring this particular wire? A. I have.

Q. What did it measure? A. One inch.

Q. What kind of wire is that, Captain; I don't mean the character of the material, but from a dealer's standpoint how would you describe it?

A. Steel wire of some description.

Q. Well, how many strands has it?

A. It is what we call 6-19.

Q. What do you mean by 6-19?

A. Six strands and 19 wires in the strand.

Q. With reference to the lay of the strands, what would you call it? A. Right lay.

Q. Do you keep wire in your chandlery stock?

A. We do.

Q. Did you keep it in November, 1905?

A. The books will show if we did.

Q. What is your best recollection of it?

Mr. FRANK.—I submit that the books are the best evidence. His best recollection may not be accurate.

The COURT.—Can you answer that question?

A. We kept different kinds of wire at that time, all the way from half inch to one inch. We do, mostly at all times keep all kinds of wire.

Q. I hand you a piece of wire, and ask you if you at that time kept that kind of a wire in stock? (Handing piece of wire to witness.)

A. I couldn't say if we did at that time. Our stock—I could not possibly swear to that, as it was

(Testimony of Captain Campbell.)
a little time after the turning over of the Wilder Steamship Company, the Wilder and the Inter-Island consolidating, and there may be possibly, with the Inter-Island some of this wire, but I couldn't swear to it.

Q. What kind is that? **[224]**

A. What we call a right and left lay wire.

Q. Have you ever kept any right and left lay wire in the Inter-Island stock, since you have been there?

A. Yes, we have.

Q. When?

A. We had some up to lately here, right and left lay; we have none at the present time.

Q. Is there any way of telling whether you kept in November, 1905, any right and left lay one inch wire, in your stock?

A. I think the books will tell.

Q. I will have to ask you to produce the books, or make an examination to answer the question?

A. At that time we didn't keep any in our stock, although the Inter-Island may have had some.

Q. Were you with the Inter-Island in 1905, in November? A. I was.

Q. Wouldn't you know their stock at that time?

A. Yes.

Q. Well, can you testify then as to whether or not they kept any at that time?

A. We kept some, but not of this size.

Q. What size is that, that you refer to?

A. This size here?

Q. Yes.

(Testimony of Captain Campbell.)

A. It may be inch, or inch and a quarter; I can't say.

Q. You neither kept inch or inch and a quarter right and left lay wire in 1905? A. No, sir.

Q. How many strands is that piece there?

A. Six strands, I think it is six.

Mr. McCLANAHAN.—We offer this piece in evidence.

Mr. FRANK.—Objected to as incompetent, irrelevant and immaterial, and not in anywise in rebuttal; as we do to the entire testimony [225] of this witness in relation to it, and we ask it be stricken out.

Mr. McCLANAHAN.—We are going to connect this with the evidence of Mr. Bissell, as to the sale of right lay wire to the dredger.

The COURT.—You want to introduce it simply as an illustration?

Mr. McCLANAHAN.—That is all.

Mr. FRANK.—Is that the only reason?

Mr. McCLANAHAN.—That is the only reason.

The COURT.—I will let it go in as a sample of right and left lay wire. It will do no harm.

The wire just referred to was here received in evidence and marked "Libellant's Exhibit 10."

Mr. FRANK.—I ask that the rest of the testimony respecting it be stricken out. I ask that all the testimony about keeping the right and left lay wire in stock in 1905 be stricken out.

The COURT.—I think it will have to stay in. The evidence shows he didn't keep it. Now, if it

(Testimony of Captain Campbell.)

has any relation to the question of what the "Pacific" purchased about that time I think it should stay in.

Mr. FRANK.—Exception.

The COURT.—If it does not, it has no relation to the case. Mr. McClanahan says it is an important fact to him that no such wire was kept in stock at that time.

Judge Stanley argues that it is not rebuttal, that Mr. McClanahan's statement does not make it competent and does not connect it with the case.

Judge STANLEY.—He must show that it is admissible according to the rules of evidence.

Mr. McCLANAHAN.—We are going to offer evidence tending to prove that in November, 1905, at or about the time of this accident, the Inter-Island Steam Navigation Company's chandlery department sold to the North American Dredging Company wire, 6 by 16 steel wire, 6 by 19. Now, see how immensely important it is in this case to know whether at that time that wire was right and left lay, or right lay. **[226]** Therefore it is immensely important to know from this witness whether they kept right and left lay wire at that time.

The COURT.—This evidence that has gone in, how do you make it rebuttal?

Mr. McCLANAHAN.—They have put in in their defense that they never had in use at that time right lay wire. That is how it is rebuttal. We are going to prove that they did. We are going to show a sale, which sale itself doesn't show whether it was

(Testimony of Captain Campbell.)

right and left lay or right lay; but we are going to show that they didn't keep any right and left lay; it must have been right lay.

The COURT.—I will overrule the objection.

Mr. FRANK.—Exception.

Mr. McCLANAHAN.—Q. Will you state, Mr. Campbell, whether you had familiarity, in November, 1905, with work in the harbor of Honolulu?

A. No, none.

Q. Did you have any familiarity with the use of clamps in harbor work?

A. Nothing more than selling to those that were working, that is all.

Q. Do you know whether or not you made sales to people who used the clamps in harbor work?

Mr. FRANK.—I don't see how this is material. What have we got to do with the sales he makes to Tom, Dick or Harry?

The COURT.—I presume it is going to the Company. I will allow it.

A. We have.

Q. Did you make any sales to the North American Dredging Company? A. We have.

Q. Do you know whether or not you made any sales of wire to the North American Dredging Company in November, 1905?

A. I don't know about the dates; the books will show the dates.

Q. Well, I will re-form the question. Did you make any sales of wire to the North American Dredging Company, in 1905? [227]

(Testimony of Captain Campbell.)

A. If I did I couldn't swear to the dates, but the books will show if there was any. The dates will be in the book.

Q. Who is the book man?

A. Mr. Bissell.

Cross-examination.

Mr. FRANK.—Q. Now, Mr. Campbell, I understood you to say that pins of the kind—or rather shackles of the kind exhibited to you here, Libellant's Exhibit 2, are, usually the pin that goes through is usually fastened with a key. Will you explain in detail what that key is?

A. Yes. The key is a piece of iron which is split, so when it goes in it will spread out, to keep that pin from coming out.

Q. That is a different kind of a fastening from the simple pin? A. Yes, sir.

Q. In other words, the key goes in, you spread it out, and the key is fixed there on both ends?

A. There is a projection on one end; the other end is split and will spread out.

Q. Then it is fixed at both ends; it is not a simple pin running through? A. No.

Q. And no danger of that falling out, is there, Captain?

A. Not very well. It rusts out, or something of that kind.

Q. Now, I understand you that you don't know what date you made sales to the North American Dredging Company of either wires or clamps?

A. I couldn't say without looking at the books.

(Testimony of Captain Campbell.)

Q. Are you a salesman of these?

A. Well, I am a salesman; there is two or three salesmen there.

Q. There are other salesmen there?

A. Yes, we all take turns at the sales. **[228]**

Q. Now, did you make sales personally to the North American Dredging Company?

A. I have, in some instances, but I couldn't say what it is.

Q. You have in some instances, but don't know what it is? A. No.

Q. Do you know who came to you and made the purchases?

A. There was Mr. Connor at that time, if I ain't mistaken.

Q. Why do you say if you are not mistaken? Haven't you any recollection of that, particularly?

A. I know he was the one that generally came there.

Q. Have you any recollection of making sales to him?

A. I have, but I couldn't say what it is.

Q. Do you know what you sold him?

A. I have sold him wire, shackles and clamps.

Q. After you made a sale you had nothing further to do with it, had you?

A. The slips was turned over to the bookkeeper.

Q. And then it was out of your hands?

A. Yes, sir.

Q. You personally had nothing to do with the delivery, or anything of that kind?

(Testimony of Captain Campbell.)

A. Saw that they were delivered, that they went down in a dray to where they were to be shipped.

Q. And that is the end of your business?

A. Yes.

Q. Where they were delivered, or whether they were delivered you wouldn't know?

A. Oh, yes, the driver would get a receipt.

Q. Where is the receipt?

A. I presume there is a copy of it there in the book.

Q. Have you got those receipts here in court?

A. Mr. Bissell I presume has. I don't know whether he has got them here.

(Mr. McClanahan gets receipt books from Mr. Bissell, who is present, and hands the same to Mr. Frank.) [229]

Mr. FRANK.—(Showing book to witness.) Q. Now, is this the only evidence of any delivery that you have; just take both of these books and point out to us the receipts that you refer to, of all the deliveries of any material whatsoever that was ever made to the North American Dredging Company?

A. No, I am not in that line. The bookkeeper is the one.

Q. Of your own personal knowledge you know nothing about it?

A. Our other accounts will show that these have been paid for.

Q. Outside of what your accounts show you know nothing about it?

A. This is what we have delivered.

(Testimony of Captain Campbell.)

Q. What the books show; you don't know anything about it? A. Mr. Bissell is the one.

Q. I want to get at your own personal knowledge, and I want to get down to the point so that we will understand what you are testifying to. As I understand it, of your own personal knowledge you know of nothing; it is in the books and Mr. Bissell is the man to testify about it?

A. I know I have sold stuff to Mr. Connors, for the North American Dredging Company, and if I ain't mistaken to Mr. Smith.

Q. And all you know is you saw it put on the dray, and that was the end, so far as you know?

A. I know the charges were made.

Q. And anything else?

A. I know in many cases they were delivered.

Q. How do you know?

A. The books show they were delivered.

Q. And that is the only way you know?

A. Yes, and because the bills were paid, if they weren't delivered they wouldn't be paid for.

Q. You had better leave the argument to counsel, Mr. Campbell?

A. That is the argument that was put to me, and it is the only way I can answer. **[230]**

Q. Mr. Campbell, did you ever see this piece of wire before, and at any other time has it been shown to you by Mr. McClanahan? (Showing Libellant's Exhibit 1.)

A. I have—a similar one to it, I wouldn't say it is that.

(Testimony of Captain Campbell.)

Q. It was up here in the courtroom you saw it?

A. Yes, sir.

Q. And so far as you could say it was the same wire? A. Yes, sir.

Q. Now, at that time of your examination did you express any opinion as to whether it was plow steel or crucible cast?

A. I couldn't tell the difference.

Q. Didn't you at that time express your opinion regarding it?

A. I can't tell the difference between plow steel and crucible.

Q. Do you know what kind of wire, whether plow steel or crucible you kept in your stock?

A. We may have kept both.

Q. You don't know, then, what kind you kept?

A. We kept crucible. We may have kept plow steel too.

Q. Do you know whether you kept any plow steel or not?

Q. I couldn't say whether we did at that time or not. We have kept plow steel.

Q. Then I understand you that so far as crucible cast is concerned you know you kept that, but so far as plow steel is concerned you don't know whether you kept that or not?

A. At that date; yes, sir.

Q. Have you any means by your books of ascertaining whether you kept any plow steel wire at that time or not?

A. The bookkeeper could explain that to you if

(Testimony of Captain Campbell.)

we did.

Mr. WATSON.—Q. Isn't it a fact that you make out your bills and state what kind of wire was sold, for instance, if a certain kind of steel wire was sold to a customer wouldn't your bill show whether it was crucible or not?

A. Yes, it would, on the bill. **[231]**

Q. Is there any way, Captain, that you yourself could find out whether you had any plow steel in stock in the latter part of November, 1905?

A. The books might show.

Q. When you say Mr. Bissell could tell, you simply mean that he has charge of the books, and not you? A. Yes, he has charge of the books.

Q. But you are the general manager, the superintendent in charge? A. Yes, sir.

Q. And you have charge of the stock?

A. Well, Mr. Bissell keeps the stock up.

Q. He keeps the stock too?

A. Well, the stock ain't kept up all the time; about once a year.

Q. Who does the purchasing?

A. Orders sent for this wire, it goes to San Francisco; we send in the order to the main office and from there it goes to San Francisco or East or wherever it may go.

Q. And the only way you can ascertain whether or not in November, 1905, you handled plow steel is by Mr. Bissell, or could you by independent research?

A. I couldn't tell myself. Mr. Bissell knows all about that.

(Testimony of Captain Campbell.)

Redirect Examination.

Mr. McCLANAHAN.—Q. What are these books which were called for by counsel and which I now show you? (Showing receipt books previously exhibited to witness.)

A. Those are the books used when we deliver goods.

Q. What do you call them?

A. Receipt books.

Q. Belonging to who?

A. Inter-Island Steam Navigation Co.

Q. Have you examined these books, Captain?

Mr. FRANK.—He has said two or three times that he doesn't know anything about it. The mere fact that we called for the books and looked at them doesn't call for their introduction without proper proof as to the signature of their receipts. [232]

A. This one here I have.

Q. You spoke of sales having been made to the North American Dredging Company, and that these books would show the receipt received by the company for those sales. Will you please turn to a page showing such receipt in the month of November, 1905? A. There is one here.

Q. What date in November is that?

A. November 6th.

Q. 1905? A. Yes.

Q. That is the Company's receipt for something sold to North American Dredging Company?

Mr. FRANK.—Object to that, as the receipt will speak for itself, and I desire, before it is introduced, to examine the witness upon it.

(Testimony of Captain Campbell.)

Mr. McCLANAHAN.—Do I understand that counsel intends to dispute the signature as found on these books as not being the signatures of any of their employees; what is the attitude of counsel?

Mr. FRANK.—We intend to make you prove everything, as you have made us prove everything.

Mr. McCLANAHAN.—Do you intend to make me prove that signature?

Mr. FRANK.—Why, certainly.

The COURT.—I will sustain the objection.

Mr. McCLANAHAN.—I am not calling for the contents of this receipt, but I am asking him if that is the receipt which was referred to by counsel. Not calling for the contents of the documents at all.

Mr. FRANK.—Before he can say that is the receipt he has got to prove the signature of the man who made the receipt.

Mr. McCLANAHAN.—We offer the book in evidence.

Mr. FRANK.—Object to it, as it has not been proved.

The COURT.—If he, as manager, is familiar with that book, he certainly can state what it is. I think that question can be asked.

Mr. FRANK.—Exception. **[233]**

Mr. McCLANAHAN.—(To Reporter.) Read the question. (Question repeated.)

A. It is.

Mr. McCLANAHAN.—We offer the book in evidence.

Mr. FRANK.—Object to that. (To the Witness.)

(Testimony of Captain Campbell.)

Q. Did you see that signed? A. No, sir.

Q. Do you know the man who signed it?

A. No, sir.

Q. How can you say it is the receipt of the North American Dredging Company?

A. It is the receipt to the Inter-Island, for goods sold.

Q. But as to the signature of the man who signed it, or as to who signed it, you know nothing about it?

A. We delivered the goods and the man came back with the book.

Q. Somebody came back and handed you the receipt? A. Yes.

Mr. McCLANAHAN.—I submit that the book should be received in evidence.

Mr. FRANK.—Object to it; there is no question of our position.

The COURT.—I think if it is the book that is used, the presumption is that it is the receipt of that company. That receipt was used in the business between the two companies, and it is common practice that that is done.

Mr. FRANK.—Your Honor is assuming that this man is our employee?

The COURT.—The presumption is that he was an agent, or they would not have taken his receipt. The presumption is he was the agent of the company.

Mr. Frank argues.

Mr. McCLANAHAN.—We propose to show that these books are kept in the ordinary course of the

(Testimony of Captain Campbell.)

business of the company, and relied upon by them, for goods sold, and we are going to offer proof of the handwriting of one of the men who signed this book.

Judge STANLEY.—Then it will be time to offer this book.

The COURT.—I haven't made a definite ruling yet; I will now make [234] a ruling admitting the book, on the presumption that it is evidence.

Judge STANLEY.—Exception.

Judge STANLEY.—I would like to ask now if it is the Court's understanding that Mr. McClanahan said, "I am not going to put in the contents of the book." Now, what is in evidence, the contents or what?

Mr. McCLANAHAN.—I made no such statement. I said I was not asking the witness a question as to the contents of the book.

Mr. FRANK.—We make the further objection that on the face of it it shows that the wire was not delivered to us at the time of the laying of the wire in question, the receipt being dated November 6th, so it cannot possibly be this wire in question, which was laid on November 4th.

Mr. McCLANAHAN.—We make no pretention that it is.

Judge STANLEY.—Then how is it rebuttal?

Mr. McCLANAHAN.—It is rebuttal of the evidence of Spencer and of Matson that they never had any right lay wire until long after the accident, more than a month.

Mr. FRANK.—That doesn't tend to rebut it at all; it may have been in the storehouse for two or three months.

Mr. McClanahan argues.

The COURT.—I think it is too uncertain, it is too remote to rebut that testimony. They were speaking of wire which was used on the 4th, as I understand it.

Mr. McClanahan argues.

Mr. McCLANAHAN.—We will prove that the North American Dredging Company was buying wire for two or three boats at that time, for the "Reclamation," the "Pacific" and the "Kaena." They were buying wire for those three boats, and that the wire was delivered to these boats and not in the warehouse.

The COURT.—The evidence may stand, subject to your connecting it. As it stands now it would be immaterial. **[235]**

Judge STANLEY.—I understand that your Honor has ruled that the evidence may stand, subject to its being connected later?

The COURT.—Yes.

Mr. FRANK.—I have just this single suggestion to make, in addition to what we have already said: It would not be proper rebuttal anyhow because it would be attempting to disprove an immaterial matter. What if they did have right lay wire afterwards?

The COURT.—I say they must put on evidence to connect this wire purchased from the Inter-Island, with wire which they were using on the dredger.

Mr. FRANK.—On the 4th, and they couldn't do that. (Argues.)

Mr. McClanahan argues.

The COURT.—I don't want to make a wrong ruling; as it is about time for adjournment I will look up the matter. Mr. McClanahan says he has some law on the subject and I will rule on it in the morning.

The Court here instructed libellant's witness to return to-morrow, March 20, at 10 o'clock, and at this point an adjournment was taken and the hearing of the above-entitled cause continued until March 20th, at 10 A. M. [236]

[Proceedings Had March 20, 1907.]

MORNING SESSION.

March 20, 1907.

Upon the opening of court further argument upon the point under discussion was had by counsel for both sides.

The COURT.—I have looked up the question in regard to Spencer. It does not support Mr. McClanahan's argument that when he said "not at that time" he was talking generally. Of course it is open to that construction, but it seems to me the probability is that when he said "not at that time" he was talking of the time when the cable was laid. That is uncertain, but it seems to me that that was the remark which defined his previous, more general remark, in which he was speaking of not using any other kind on the dredge. If that is the case, the other matter, that came up on cross-examination, is

immaterial to my mind, because it refers to a later time and has no connection with the period when the cable was laid, and if immaterial it cannot be brought up to be contradicted.

In the case of Cloutier vs. Grafton & Upton R. R., 162 Mass. 473, there was no doubt in the mind of the Court that the conversation referred to was material, and the conversation, on cross-examination, was similar to that on direct, but of another period; the case of Tiller vs. State, S. E. Reporter, stated in the syllabus, it was a matter of three gamblers being indicted and only one of them was tried. The evidence was that they were seen gambling together at a certain time and place and the defence offered evidence to show that one of the three, not the one that was being tried, was somewhere else, to prove an alibi. The Court ruled that that was material, that it was part of the transaction, and allowed a reversal because that evidence had been refused and it was material.

Now, in regard to Mr. Miller's testimony, I must confess that Mr. McClanahan's argument that Mr. Miller had stated definitely that there was no such wire used, and there was none in the possession of the company, I think the contention would have been sound; but his testimony was, after he stated in direct that they used right and left lay wire cable, he said on cross-examination, [237] "While she may have had other wires aboard I never saw them, I wouldn't say she didn't use other kinds." He can only be contradicted—evidence might be produced that he did see other wires, but evidence that there

were other wires sold to the company does not contradict him, because he said they may have used them but he didn't see them. The point is a very nice one. I find from examination of different authorities that it comes to a very fine point, but I think the favorable decisions to the contention of the plaintiff are not applicable to the circumstances of this case, and I feel that I must sustain the objection, and I so rule.

Mr. McCLANAHAN.—Exception.

Mr. FRANK.—I would ask now to have all the testimony of Mr. Campbell, with respect to the sale of this kind of wire to the dredging company, stricken out from the record.

Mr. McCLANAHAN.—Object to that. We have other sales we propose to show. I submit that his evidence that he sold right lay wire to them in 1905 should not go out.

Mr. FRANK.—It being indefinite it is open to the same objection, unless they fix it as to time it should be stricken out. Mr. McClanahan, do you make any claim that you sold right lay wire to the North American Dredging Company before November 6th?

Mr. McCLANAHAN.—I have made no investigation further back than November 6th.

Mr. FRANK.—Therefore your offer to prove that other wire was sold before that time, to the dredging company, was made without information, and should not be made before this Court. I move it be stricken out.

The COURT.—He says he sold them wire, and that the books will show.

Mr. FRANK.—As to these sales, as shown by those books, I ask that this testimony be stricken out.

Mr. McCLANAHAN.—I submit that Captain Campbell has stated that he has made sales in November, 1905. That the dates of the sales will [238] be shown by the books of the company. There is nothing there to restrict the evidence of Mr. Campbell that the sales were limited to any particular time by these receipt books.

Mr. FRANK.—I asked counsel if he knows of any sales made previous to this date, and he says he knows of none. If they have any other testimony which will show a delivery of wire before November 6th, let them produce it. I think now the thing should be stricken out.

The COURT.—I think that the evidence may stand, because they haven't finished their evidence as to the books, and that may stand subject to their showing a sale before the 4th of November.

Mr. FRANK.—And if they do not, I understand it will be stricken out?

The COURT.—Yes, I think so.

Mr. McCLANAHAN.—I submit the Court should not restrict us in our proof in that way. I understand the Court has ruled that way. I simply want to explain that I think the Court is restricting us improperly.

The COURT.—It looks to me as though this evidence could be of no use to the Court unless it is definite as to time. The question in my mind is whether it has the elements of materiality. I will

hold to that ruling. It shall go out unless there is evidence fixing a sale at a period before or on the 4th of November.

Mr. McCLANAHAN.—Exception.

Captain CAMPBELL (Continued).

Mr. McCLANAHAN.—Now, if the Court please, we offer to prove a sale to the North American Dredging Company for the dredger "Pacific" on November 6th, 1905, of 450 feet of wire, identical in size and twist to Libellant's Exhibit 1. We offer to prove a delivery of this wire to the dredger "Pacific." We offer to prove a sale and delivery on November 6th, to the North American Dredging Company of twelve wrought iron clamps for inch wire, wire similar to Exhibit 1, clamps similar to Libellant's Exhibit 8. We offer to prove a sale [239] and delivery to the North American Dredging Company, for the dredger "Pacific," on November 6th, of half a dozen shackles, similar in size to Exhibit 2 of the libellant. We offer to prove a sale on November 20th, 1905, of 1,443 feet of wire to the North American Dredging Company, for the "Pacific," the same in size, make and twist as Libellant's Exhibit 1.

The COURT.—(To Mr. FRANK.) And that is objected to as immaterial?

Mr. FRANK.—Yes, on the same grounds as the previous objection.

The COURT.—Sustain the objection.

Mr. McCLANAHAN.—Exception.

Mr. McCLANAHAN.—I understand that there is not any objection because I have offered to make this offer of proof in a lump?

The COURT.—No.

Mr. McCLANAHAN.—Q. On your cross-examination, Captain, you were questioned in regard to plow steel wire. What is plow steel wire used for?

A. It is used for different purposes.

Q. Has it no particular use, particularly applicable because of the character of the wire, and so forth?

A. Yes; as I understand it—I don't know as I can positively say, but steam plow wire, that is where it originated its name, as it requires a very substantial wire and this wire was made, plow steel wire, the wire they use on steam plows. But it is used also for other purposes, as there is a better strength to it than there is to a crucible cast. It is stronger.

Q. Can it be told by you from crucible steel wire of the same size and shape when new?

A. I don't know if I could swear that it could.

Q. It is a difficult matter to ascertain?

A. Yes.

Q. After it is old can it be told?

A. Well, I don't know.

Q. That is, there is a strong similarity when the wire is the same make, of both plow steel and crucible, when old?

A. I couldn't tell the difference between the two. It is hard to tell. **[240]**

Q. Have you had any experience in the matter?

A. Only from the sale of it.

Mr. McCLANAHAN.—That's all.

Mr. FRANK.—No questions. **[241]**

[Testimony of Captain Tripp, for Libelants (in Rebuttal).]

Captain. TRIPP, called as a witness for libellants in rebuttal (having been previously sworn for libellant in the main case), testified as follows:

Direct Examination.

Mr. McCLANAHAN.—Q. Assuming that the dredger "Pacific,"—come to the map, please, Captain,—assuming that the dredger "Pacific" is at a point in front of the Bishop slip, can you tell whether the water in a course from that point to where buoy No. 2 originally and in its proper place was is deep or shallow?

A. To where the buoy was in its natural place?

Q. Yes, from this point to that (showing) in a straight course,—would that be deep or shallow?

A. It would be deep till you got to this point. Before you get to where the "Mokulii" lays you strike a point outside of the buoy right over this way (showing).

Q. Do you refer to Young Brothers' Island?

A. No, this side of that there is a point. This island was pumped up afterwards.

Q. Young Brothers' Island—that is shallow water, isn't it? A. Yes, nearer the lighthouse.

Q. Now, the course that I have reference to would be 40 or 50 feet shoreways from the end of Young Brothers' Island?

A. You go in shallow water there.

Q. Mauka yes?

(Testimony of Captain Tripp.)

A. 50 feet from the point from Young Brothers' Island, you mean?

Q. Yes.

A. It is deep water, you want to know if the water is deep.

Q. That is, the course from the dredge to the buoy is a course **[242]** that would be 50 feet mauka of Young Brothers' Island?

Judge STANLEY.—Object to that as the witness has not so testified.

Mr. McCLANAHAN.—Withdraw the question.

Q. This course which I have referred to is a course running from the dredge in front of the Bishop slip to Buoy No. 2 in its original position?

A. Yes.

Q. And the course would be 40 or 50 feet mauka of the end of Young Brothers' Island; is that deep water or shallow?

A. How much do you mean it is deep,—it is not deep water?

Q. Is it one foot? A. Oh, yes, 20 feet.

Q. All along that course—would it be deep water, if you call deep water 20 feet?

A. 50 feet off it will come up.

Q. To the buoy?

A. There is a point runs mauka of this buoy in shallow water. This "Mokulii" wouldn't be more than 2 feet at the stern. There is a buoy outside of that, the buoy runs right into a bight and you see the bight until you get past the buoy in shoal water. That point outside of that buoy is shoal water.

(Testimony of Captain Tripp.)

Q. What is the depth of the water, shoal or deep, 20 or 25 feet from the bow of the "Mokulii" mauka?

A. 25 feet from the bow of the "Mokulii" mauka I don't think you would have 20 feet.

Q. Would you have more than 5 feet?

A. Oh, yes.

Q. How deep is the water at buoy No. 2?

A. 24 feet when it lays in its natural position.

Q. Are you familiar, Captain, to the use to which these buoys **[243]** No. 1 and No. 2 were put?

A. Yes, sir.

Q. How long does your familiarity extend?

A. Over five years.

Q. Did you ever in your experience know of the use of one of these buoys by throwing a rope or mooring line over it to the anchor chain beneath?

A. No. The ring on top of the buoy is to make fast to,—a big ring.

Q. Could a man stand at the end of Naval Wharf No. 2 and see buoy No. 2 as it lay in its changed position on the afternoon of November 10?

A. I don't think he could see it.

Q. Could he see buoy No. 1? A. Yes.

Q. Captain, during the time of the dredging operations of the dredger "Pacific" did you ever foul any of her wires lying in the harbor?

Mr. FRANK.—I object to that as immaterial and not rebuttal.

The COURT.—What does it rebut?

Mr. McCLANAHAN.—The general defense of these claimants that their wire which they laid in

(Testimony of Captain Tripp.)

the harbor did not foul our propeller. The evidence shows they were laying wires all over the harbor and it bears on the probabilities of the case as put in by the defendant. It is in rebuttal of the general evidence of the defense that it was not their wire which fouled our propeller.

The COURT.—I will sustain the objection.

Mr. McCLANAHAN.—Exception. **[244]**

Cross-examination.

Mr. FRANK.—Question. I understand you to say there is shoal water running out from where the buoy usually was?

A. The buoy is in deep water. That is 24 feet (showing on the map). I am kind of left-handed here.

Q. This is the Honolulu side of the harbor (pointing)?

A. There is a point runs out. The "Mokulii" wouldn't have more than two feet, this is the "Mokulii" here (pointing), while the buoy was lying in a little bight at a point outside of that shoal water. You could see the shoal water plain when hauling ships down when we got past the buoy.

Q. You haven't any idea of the depth of that water in the bight?

A. In the bight it would go down 22 feet.

Q. I mean in the point?

A. I never sounded it, we could see the yellow streak and kept clear of it so as not to ground the ship.

Q. Mr. McClanahan when he asked you about

(Testimony of Captain Tripp.)

the line from that buoy to the dredger, he took the line marked "Cross P. J. M." Now, assuming the dredger was working in the rectangle here which is "6 P. M. Nov. 4 to 6 A. M. Nov. 5, G. M. Cushing," on a line from that to where the buoy should have been located, what have you to say with reference to shallow water, passing close to Young Brothers' Island?

Mr. McCLANAHAN.—Object to the question as the point of commencement covers the work of the dredge during the night-time of November 4 and the morning of November 5.

Mr. FRANK.—The testimony shows that the wire was laid on November 4th.

Mr. McCLANAHAN.—Not at night-time. The time was (showing) "7 A. M. to 6 P. M. November 4th," right in there.

Mr. FRANK.—(To Mr. McClanahan.) When this was laid? **[245]**

Mr. McCLANAHAN.—Yes, sir.

Mr. FRANK.—I have a right to ask both that question and this question.

Mr. McCLANAHAN.—Object to it as immaterial.

The COURT.—Sustain the objection.

Mr. FRANK.—Question. Now what have you to say concerning a straight line running from the position marked with a blue "A" in pencil?

Mr. McCLANAHAN.—Object to that on the same ground,—it is immaterial.

Mr. FRANK.—That is from 7 A. M. to 6 P. M. November 3d. Isn't that "A," Mr. McClanahan,

(Testimony of Captain Tripp.)
the location of the dredge as put on by one of the witnesses?

Mr. McCLANAHAN.—That brings us to this point, as to the accuracy of this map.

The COURT.—I will allow the question.

Mr. McCLANAHAN.—Exception.

Mr. FRANK.—Q. What have you to say with reference to a straight line drawn from the position marked "A" up to the buoy with reference to the depth of the water at any point on that straight line? A. What is the distance here?

Mr. McCLANAHAN.—40 or 50 feet.

Mr. FRANK.—Q. Give us the depth of all of the distance so far as you know.

A. From that letter "A"?

Q. Yes.

A. Well, that is about an inch from the island,—how many feet have you got there?

Mr. FRANK.—100 feet to the inch.

The WITNESS.—She would be way up to the wharf, away up town.

Mr. FRANK.—Question. That is 100 feet you have got there? **[246]**

A. You have deep water at 100 feet off, but within 20 feet of the bow of the "Mokulii" you wouldn't have much water.

Q. You wouldn't have much water within 20 feet or 25 feet of the bow of the "Mokulii"?

A. Yes. That is for any draft ships.

The COURT.—How deep would that water be 100 feet from the island?

(Testimony of Captain Tripp.)

A. Oh, 100 feet, it would be 26 or 27 feet, I should say.

Mr. FRANK.—Q. Now, Captain, do you recognize this map, showing you Claimant's Exhibit No. 2, attached to Spencer's testimony (being Libellee's Exhibit "E")?

A. What is this? (Pointing.)

Mr. FRANK.—The Bishop wharf.

Q. Do you recognize that map, Captain?

A. I don't know as I have ever seen it. I don't remember seeing this.

Q. Well, this is an official map of this harbor by Lieut. Slattery, June, 1905. Now, will you examine that map and place if you can the approximate location of buoy number 2 upon it. I think for that purpose you had better use a red pencil because you can see it better.

A. From what point, from where?

Q. Well, just put the buoy in the location where you think it ought to be.

The COURT.—Buoy No. 2, the buoy that is near the "Mokulii."

Mr. FRANK.—Near the "Mary E. Foster."

Mr. McCLANAHAN.—You mean the buoy in its original position, Mr. Frank?

Mr. FRANK.—Yes. What we are after is buoy No. 2, what you say you put the "Mary E. Foster" alongside of.

A. The lighthouse is here (pointing). [247]

Q. Yes, there is the lighthouse.

A. I don't see that bight in here at all—where

(Testimony of Captain Tripp.)
the buoy lies there is 24 feet of water on the point running outside of here, I don't see it.

Q. Just follow up that reef and see if you don't see the bight with the point running outside.

A. I don't think that is it. It don't look right to my eye at all.

The COURT.—Can you fix its position from its relation to the wharves?

A. What would that be—about 400 feet in there —it seems to me I haven't got the bight in there.

Mr. FRANK.—Well, get the scale.

Mr. WATSON.—It runs 300 feet to the inch.

The WITNESS.—300 feet to the inch?

Mr. FRANK.—Yes, sir.

The WITNESS.—I think it is right in here somewhere 24 feet of water, I judge about 300 feet from here and 400 feet from the lighthouse, that is what I should judge, 24 feet of water when it lies naturally.

Mr. FRANK.—Q. Well, we will draw a line from this dot which you have made and we will mark that "T" for Tripp, and this spot right in here opposite the arrow marked "T" is about where you think that buoy was?

A. That is where I think, but the bight don't look hardly natural. The bight may have been shorter so that the buoy was further in.

Q. And the shoal water further out?

A. Yes. The "Mokulii" lay with her stern in shoal water and her bow in deep water.

Q. That would be shoal water indicated here next

(Testimony of Captain Tripp.)

to the buoy? [248]

A. That might be, the white line might be and it was shoal outside. We could run down with a ship to that white line mark. It is about 400 feet from the lighthouse to that buoy when it was natural.

Mr. FRANK.—Q. Now, with reference to this map here, Captain Tripp, I will ask you if according to the blue line this line running here from the neighborhood of the lighthouse to the Quarantine wharf, whether this map indicates the situation after the dredging and not before it.

A. It appears so, I can't recognize it at all.

Mr. McCLANAHAN.—Object to the question and ask that the answer be stricken out on the ground that counsel has already admitted the accuracy of that map.

Mr. FRANK.—Certainly after the dredging.

Mr. McCLANAHAN.—I submit that the map was drawn long before the dredging commenced and was used by the dredging company as a guide to the dredging.

Mr. FRANK.—To show that that is not so I will show your Honor the official map of June '05.

The COURT.—It is evident that this map don't purport to show the contour of the bottom. (To Mr. McClanahan.) You don't claim that it shows the bottom?

Mr. McCLANAHAN.—That map shows no soundings at all.

Mr. FRANK.—If he admits that it don't show the contour of the bottom at the time that the wire

(Testimony of Captain Tripp.)
was laid, that is the end of the whole business.

Mr. McCLANAHAN.—I will admit that it shows no soundings.

The COURT.—You admit, don't you, that this blue line shows approximately the edge of the shoal water?

Mr. McCLANAHAN.—The contour of the reef.

Mr. FRANK.—It does not show it at the time before the dredging **[249]** that is what I want to get at.

Mr. McCLANAHAN.—You will never get that admission from me, because Capt. Lorenzen did locate that buoy by fixing the blue contour line as the shoal line that existed prior to the dredging. The blue-print is the same thing exactly except that the blue-print shows the soundings.

Mr. FRANK.—I will ask you this, Mr. McClanahan. Is it not a fact that you told me when you asked me to admit that that map was correct, that it was a reproducion of the lines taken from Slattery's Honolulu map and that you didn't wish to call Slattery to prove it and wanted me to admit it?

Mr. McCLANAHAN.—With the exception of the soundings.

Mr. FRANK.—It hasn't got the soundings.

Mr. McCLANAHAN.—Yes, that is what I said, with the exception of the soundings, it shows on its face to be that.

Mr. FRANK.—Very well then, that is enough.

Redirect Examination.

Mr. McCLANAHAN.—Question. Captain, when

(Testimony of Captain Tripp.)

you said that there was shoal water outside of the buoy what did you mean by shoal water?

A. Well, they wouldn't have enough to float a ship of any kind, what they call a ship—10 to 12 feet of water, light ballast schooner.

Recross-examination.

Mr. FRANK.—Question. Now, I will show you again this map and ask you what these soundings are in the bight in the direction of the lighthouse to where you placed the buoy.

Mr. McCLANAHAN.—Object to that as the map speaks for itself and [250] on the further ground that it is not proper recross-examination.

The COURT.—There is no use asking him what these figures are, they speak for themselves, but you can cross-examine him on that last statement.

Mr. FRANK.—Well, consult the map and see whether or not the number of feet—I ask you whether or not on that bight just to the lighthouse side of that buoy the water is not as shoal as two or three feet—as indicated on the map?

A. You mean at the present time?

Q. No, previously.

A. I can't make out the figure.

Mr. McCLANAHAN.—The witness has not been asked to pick out the figures.

Mr. FRANK.—Question. Now, if it should appear on this map of Mr. Slattery's that the shoal water was as shallow as two or three feet there, would you still think that your estimate of ten feet was correct?

(Testimony of Captain Tripp.)

Mr. McCLANAHAN.—Object to it as indefinite.

The COURT.—He has already said to the lighthouse side of the buoy. How close to the buoy?

The WITNESS.—About 40 or 50 feet from the buoy you would strike very shallow water towards the lighthouse.

Mr. FRANK.—Q. And so far as you know that map as shallow as 2 or 3 feet?

A. Well, yes, towards the lighthouse it would be as shallow as 2 or 3 feet—50 feet from the buoy.

Q. And abreast of the buoy?

A. No, further back and 50 feet towards the lighthouse would place it in shallow water—from the buoy when in its natural place. **[251]**

Further Redirect Examination.

Mr. McCLANAHAN.—Question. And how far abaft of the bow of the "Mokulii"?

A. Oh, the length of her, her stern was drawing three feet.

Q. Answer the question.

A. I don't know how long the "Mokulii" is.

Q. Assuming her to be 84 feet long.

A. She ain't that.

Q. Well, assume it, Captain.

A. Oh, it would be very shallow water; if she is as long as that the bow would be in deep water.

Q. You haven't answered my question. You said 40 or 50 feet towards the lighthouse from the buoy you would find 2 or 3 feet of water. I want to know how far back of the "Mokulii"?

A. The length of it.

(Testimony of Captain Tripp.)

Further Recross-examination.

Mr. FRANK.—As a matter of fact, you didn't put the "Mokulii" there? A. No.

Q. And you didn't know just exactly how she was anchored but only in an approximate way?

A. Yes, sir.

Mr. FRANK.—That's all.

Mr. McCLANAHAN.—That's all. **[252]**

[Testimony of John A. Young, for Libelants (in Rebuttal).]

JOHN A. YOUNG, called as a witness for libellants in rebuttal, being duly sworn, testified as follows:

Direct Examination.

Mr. FRANK.—Now, it is understood as it was yesterday that this is all subject to our objection as being not proper rebuttal.

The COURT.—Yes.

Mr. McCLANAHAN.—Q. What is your name?

A. John A. Young.

Q. How old are you? A. 25.

Q. Where do you live? A. In Honolulu.

Q. What is your business?

A. Launching business,—a general launching business.

Q. Do you know of a vessel that was moored on the other side of the channel during November, 1905, called the "Mokulii"? A. I do.

Q. What do you know about the "Mokulii"?

A. My brother and I owned her at the time.

(Testimony of John A. Young.)

Q. What is your brother's name?

A. William E. Young.

Q. You and William E. Young owned this boat?

A. Yes, sir.

Q. Who moored her on the other side of the channel? A. I did.

Mr. FRANK.—I want to know what the object of this testimony is because I can't see what there is in any of the testimony to be rebutted by who moored the "Mokulii" there or anything about it. **[253]**

Mr. McCLANAHAN.—These are only preliminary questions. If the Court wants I am perfectly willing to make any statement; we want to prove by this witness that when Captain Miller—we want to rebut Captain Miller's statement that the "Mokulii" was moored with wire cables running to either the ring of the buoy or to the anchor chain of buoy No. 2.

Mr. FRANK.—Well, if that is the purpose it is clearly not rebuttal testimony. It was entirely on cross-examination that he was asked about that.

(Here followed argument by counsel for both sides during which recess was taken and the hearing of the above-entitled cause was continued until 2 P. M.)

[Proceedings Had March 20, 1907 (Continued).]

AFTERNOON SESSION.

March 20th, 1907.

Upon the Court's coming to order the argument was continued by counsel.

The COURT.—Sustain the objection.

(Testimony of John A. Young.)

Mr. McCLANAHAN.—Exception.

Mr. McCLANAHAN.—Question. Mr. Young, who moored the "Mokulii" to the place where she was moored?

Judge STANLEY.—Object to that as incompetent, not proper rebuttal and within your Honor's ruling.

Mr. DERBY.—We are on the question of wires now that Captain Miller says weren't delivered to him with the "Mokulii." This is as to new matter brought out in the testimony. The purpose is simply to show that it was not the "Mokulii's" wires which fouled the steamship "Siberia." Captain Miller has brought out that these wires may have been there over the buoy. It seems to [254] me that we should be allowed to rebut that evidence.

The COURT.—I will overrule the objection.

Mr. FRANK.—Exception.

A. She was moored twice that boat. My brother Herbert bought her from the Inter-Island Steamship Co. and we put her on the ways and afterwards moored her across there and we bought Herbert out of business. After she was moored there we took up the moorings and put her over by our house. We bought Herbert out and it was always Will's and my object to try to get rid of the "Mokulii." We didn't want her. Herbert wouldn't let us sell her,—

Mr. FRANK.—Object to that as not in answer to the question.

The WITNESS.—The second time I moored her.

(Testimony of John A. Young.)

Mr. McCLANAHAN.—Q. What did you moor her with?

A. Two anchors forward and one anchor aft.

Mr. FRANK.—Objected to as immaterial.

The COURT.—You don't want to go into the question which has been ruled upon?

Mr. McCLANAHAN.—No, I am not going into it.

The COURT.—Then, I think this question is allowable.

The WITNESS.—A. It wasn't a real anchor aft, it was a drag. We had made it to drag the "Oregon's" anchor and it broke two flukes and we used it for a big stern mooring. We put it out by the lighthouse and had a chain on it—

Mr. FRANK.—I ask that the witness be instructed to answer the question and no more.

The COURT.—That may be stricken out.

The WITNESS.—(Continuing.) I had a chain leading to the edge of the water line and a piece of this 5/8 inch steel pliable wire—elevator wire out of the Von Hamm Young elevator out of the Young Building.

The COURT.—What part did that lead from?

[255]

A. From the starboard quarter.

Mr. McCLANAHAN.—Question. Was that the mooring of the "Mokulii" up to the time of her removal from that position? A. Yes, sir.

Mr. FRANK.—Object to that. We are making progress in forbidden water.

The COURT.—I don't see any objection to that.

(Testimony of John A. Young.)

Mr. FRANK.—Exception.

Mr. McCLANAHAN.—Question. When was she taken from that position, before or after the accident to the "Siberia"?

Mr. FRANK.—Object to that as immaterial.

The COURT.—Objection overruled.

Mr. FRANK.—Exception.

A. I took her away from there November 27th, 1905.

Mr. McCLANAHAN.—Q. What have you to say with reference to the steel mooring line? As to its size as compared with Libellant's Exhibit 1 which I hand you?

Mr. FRANK.—Object to that as utterly immaterial. Submit that it is an attempt to do indirectly what your Honor has said they could not do directly.

The COURT.—It looks so to me, Mr. McClanahan.

Mr. McCLANAHAN.—It is to destroy the inference which would be drawn if it was left out that it was the line which fouled our screw.

The COURT.—It may be important, but is it rebuttal?

Mr. McCLANAHAN.—It is rebuttal of the inference which the Court is asked to form.

The COURT.—I don't think there is any evidence that this would rebut. Sustain the objection.

Mr. McCLANAHAN.—Exception.

Mr. McCLANAHAN.—Question. Where are those mooring lines, the [256] steel mooring line?

A. Miller never bought that.

(Testimony of John A. Young.)

Q. Where is it?

Mr. FRANK.—Objected to as immaterial where they are. Question is whether or not they were given to Miller. It is immaterial where they are.

The COURT.—Overrule the objection.

Mr. FRANK.—Exception.

Mr. McCLANAHAN.—Q. Where is that steel mooring line?

A. Well, I can't say exactly whether it is at my house or not. I know I brought them home. Miller never bought them and I have the paper to show that he never bought them. He only bought the hull,—we took the wires and everything else up to our house, the two anchors forward and the anchor aft. There was only one short piece of wire. We took the wire home.

The COURT.—Strike out all of that except that he says he took the wires home.

Mr. McCLANAHAN.—Then that part of his answer in which he states that he took the steel mooring line home remains in?

The COURT.—Yes.

Mr. FRANK.—I move to strike that out because it doesn't tend to rebut anything that Captain Miller said. That shows that what Captain Miller said was true. I move the whole of it be stricken out.

(Here followed argument by counsel on both sides.)

The COURT.—Strike it all out.

Mr. McCLANAHAN.—Exception.

Mr. McCLANAHAN.—Question. Have you that

(Testimony of John A. Young.)

wire now?

Judge STANLEY.—Object to that as an attempt to get around your Honor's ruling. [257]

The COURT.—Sustain the objection.

Mr. McCLANAHAN.—Exception.

Mr. McCLANAHAN.—We offer now to prove by this witness that this steel mooring line was not attached to the anchor-chain of the buoy No. 2 at any time and more particularly during the time extending from November 1 to November 15. We offer to prove that the mooring line of the "Mokulii" did not exceed 30 or 40 feet in length and was of a smaller make of wire than Exhibit No. 1, that is the steel wire. We offer to prove that this steel line of 30 or 40 feet in length was shackled or made fast to an anchor running to a drag and passed over the starboard quarter of the "Mokulii" further on to shoal water or the reef; that this wire steel mooring line is now in the possession of the witness and has been ever since the removal of the "Mokulii" from her mooring near Buoy No. 2 on November 27, 1905.

Mr. WATSON.—We object to the receipt of this evidence as rebuttal.

The COURT.—Sustain the objection.

Mr. McCLANAHAN.—Exception.

Mr. McCLANAHAN.—Q. Johnnie, are you familiar with buoy No. 2 and buoy No. 1, the one near the lighthouse and the one Ewa of the lighthouse?

A. I know their positions, yes, sir.

Q. I believe you stated you were in the launching business? A. Yes, sir.

(Testimony of John A. Young.)

Q. And where have you carried on the launching business?

A. In Honolulu Harbor around here.

Q. How long?

A. This is the 7th year.

Q. Were you carrying on this business in November, 1905? [258]

A. Yes, sir.

Q. Will you state whether you have ever known of a mooring line being made fast to the anchor-chain of buoy No. 2?

Mr. FRANK.—Object to that as not rebuttal.

Mr. McCLANAHAN.—Later on I am going to ask your Honor out of order of the presentation of the evidence in this case to allow me to show that the "Mokulii" was never attached to the buoy and that the moorings are now in the possession of this witness. I do say that it rebuts this inference which the defense in its evidence has drawn.

The COURT.—Sustain the objection. I don't see that it is of any value.

Mr. McCLANAHAN.—Exception.

Mr. McCLANAHAN.—That's all.

Mr. FRANK.—No questions. [259]

[Testimony of F. W. Klebahn, for Libelants (in Rebuttal).]

F. W. KLEBAHN, called as a witness for libellants in rebuttal (having been previously sworn as a witness for libellants in their main case), testified as follows:

Direct Examination.

Mr. McCLANAHAN.—Question: Mr. Klebahn, do you remember a visit to the dredge "Pacific" while she was working in Honolulu Harbor made by you sometime in February, 1906?

Judge STANLEY.—Objected to as incompetent, irrelevant and immaterial and not rebuttal.

The COURT.—Overrule the objection. (To Mr. McClanahan.) Can you make a statement of what it is to show.

Mr. McCLANAHAN.—We propose now to prove by this witness and other witnesses that on the 7th day of February, 1906, in a gasoline or some other kind of a launch a visit was made to the dredge while she was operating in the harbor, with her pontoons alongside of her and her pipe line running to the shore; that at that time this witness and the other gentlemen took with them this Libellant's Exhibit No. 1, examined the wires found on the pontoons and on the pipe lines; connecting the pipe-lines; that they found that there was wire on the pontoons of right lay, they found also right lay wire on the pipe-lines, connecting the pipe-lines. That the wire was 6 strand as this is, of the same size exactly. Also that the wire was serviceable but old.

(Testimony of F. W. Klebahn.)

Mr. FRANK.—This was in February, 1906, a time when it is admitted we had right lay wire. There is nothing of rebuttal in such testimony as that and it is incompetent and immaterial.

The COURT.—I will sustain the objection.

Mr. McCLANAHAN.—Exception. **[260]**

Mr. McCLANAHAN.—I now make and offer to prove that Mr. Klebahn, Superintendent of Public Works Holloway, Captain Fuller the Harbor Master, and myself visited the pontoon of the dredge "Pacific" and the dredge "Pacific" on the 7th of February, 1906, taking with us Libellant's Exhibit 1 and that at that time we found wire identical in every respect to Libellant's Exhibit 1 on the pontoons and used in connecting the discharging pipe of the dredger. That all of this wire that we saw at that time was old and not new wire, showing service.

Mr. WATSON.—Object to that on the ground already stated.

The COURT.—Sustain the objection.

Mr. McCLANAHAN.—Exception.

Mr. McCLANAHAN.—Question. You remember, do you, the accident to the "Siberia?"

A. Yes, sir.

Q. Will you state whether or not after the accident to the "Siberia" you made a visit to buoy No. 1 in front of the lighthouse? A. Yes, sir.

Q. When was that, do you remember?

A. I believe on Monday morning about 10 o'clock, the Monday after the "Siberia" fouled the wire, which was on Friday night.

(Testimony of F. W. Klebahn.)

Q. This was the Monday following?

A. I think it was Monday morning about 10 o'clock.

Q. What was the occasion of your visiting the buoy?

A. I had a telephone message that the buoy was picked up by the pile-driver belonging to the Territorial Government and that a wire was connected with the chain of the buoy. I immediately proceeded in a boat to the pile-driver and looked at things myself as it was left there. **[261]**

The COURT.—It was on the pile-driver?

A. The buoy was hoisted on the pile-driver, showing the chain and the wire around the chain. Part of the wire was placed on the pile-driver or pontoon and was laying there.

Mr. McCLANAHAN.—Q. Was this old or new wire? A. New wire.

Mr. WATSON.—Move that the answer be stricken out in order to object to the evidence on the ground that Mr. Klebahn is not an expert as to wire, old or new, and on the ground that it is not rebuttal.

The COURT.—I will rule on that later on.

Mr. McCLANAHAN.—Q. Did you see anything at that time besides the wire in connection with the wire?

A. I saw clamps and I saw a shackle.

Q. I hand you Libellant's Exhibit 8 and ask you what you have to say as to that clamp as compared with the clamps that you saw?

A. They are similar to this.

(Testimony of F. W. Klebahn.)

Mr. FRANK.—I can't see what this is rebuttal of.

Mr. McCLANAHAN.—We propose to show by this witness that this wire fastened to the anchor-chain had clamps similar to that (showing) had a shackle similar to that (showing), and that the fastening of the wire in the chain was not by means of a long rope, but the fastening and the shackle and the clamp were at the chain and not out in the harbor or the channel. That, if the Court please, will rebut Mr. Spencer and Mr. Matson on a point as to how they put this wire around buoy No. 1, as they did around buoy No. 2, by means of a pennant made in the form of a loop 75 or 100 feet long with the shackle and clamps on it, moored by a float out in the channel away from the buoy. **[262]** This according to the testimony of Spencer was a mooring line which was fixed at the time or near the time the other one was.

Mr. FRANK.—We object to it as immaterial.

The COURT.—It seems to me it is material. I will allow it.

Mr. FRANK.—Exception.

Mr. McCLANAHAN. — Q. Could you tell whether the clamps were new or old?

Mr. WATSON.—Object to it on the same ground, that he is not shown to be an expert.

The WITNESS.—I don't think, your Honor, that it is necessary—

Mr. McCLANAHAN.—Don't argue; go ahead and answer the question.

The WITNESS.—It was a new one in my opin-

(Testimony of F. W. Klebahn.)

ion.

Mr. McCLANAHAN.—I ask that the attempt of the witness to argue be stricken from the record.

Mr. FRANK.—I ask that it stay in.

The COURT.—That may stay in.

Mr. McCLANAHAN.—Exception.

Mr. McCLANAHAN.—Q. I show you Libellant's Exhibit 2 and ask you what you have to say with reference to its similarity or non-similarity with the shackle you saw at that time.

A. It was similar to this one.

Q. Where, Mr. Klebahn, on the wire were these clamps and this shackle?

A. Not more than 5 feet away from the chain.

Q. Can you state how much of the wire was on the pile-driver?

A. You mean on the pontoon of the pile-driver?

Q. Whatever it is, the pontoon or the pile-driver?

A. Well, it is impossible to state the exact quantity, it was—

Q. Can you approximate it?

A. Oh, I would judge at least 20 feet. **[263]**

Q. Didn't you see where the wire ran out into the channel? A. Yes, sir.

Q. Was that a single or a double wire?

A. A single wire.

Q. With reference to the size of the wire what have you to say from examination of Libellant's Exhibit 1 as to its similarity?

A. It was similar to that.

(Testimony of F. W. Klebahn.)

Mr. FRANK.—Q. That is as to size?

A. As to size.

Mr. McCLANAHAN.—Q. I believe you said heretofore in your direct examination that you had the duty of looking after the ships when they are in the harbor here, representing your company?

A. Yes, sir.

Q. Can you state whether or not there was an officer on the after poop-deck of the "Siberia" when she backed out on November 10, 1905?

Mr. FRANK.—Object to that. That was their original case. They have alleged originally that they were guilty of no negligence.

Mr. McCLANAHAN.—It is in rebuttal of Easton and Le Gross.

(Counsel commenced argument on this point, and Mr. Frank stated that Judge Stanley could present authorities to the Court.)

The COURT.—Can you go on with other evidence and leave this for the time being?

Mr. McCLANAHAN.—Q. I don't know that it is strictly rebuttal but I think the **[264]** Court will allow this question, what is the exact length of the "Siberia"? I think Easton said some 600 and odd feet.

Mr. WATSON.—We object to it as not proper rebuttal.

Mr. McCLANAHAN.—This question of allowing this evidence is purely discretionary with your Honor.

The COURT.—I will allow the question.

(Testimony of F. W. Klebahn.)

Mr. WATSON.—Exception.

A. We always consider her 575 feet.

The COURT.—Perhaps we had better hear argument on this matter to-morrow morning. It is a technical question whether that could be shown.

Mr. DERBY.—I have authorities that I will present to your Honor on a motion we are going to make allowing Young, out of order, to give this evidence which was ruled out. We give this notice, out of order so that counsel can get their authorities.

(At this point court adjourned and the hearing of the above-entitled cause was continued until March 21st, 1907, at 10 o'clock A. M.) **[265]**

[Proceedings Had March 21, 1907.]

MORNING SESSION.

March 21, 1907.

Mr. FRANK.—At the close last evening the question was under consideration as to whether or not the proof then offered with respect to the lookout on board of the steamer as she was backing out from the wharf was part of the principal case of the libellants or whether it was proper rebuttal, and at that time I made the statement that it was settled law that the libellant was not only bound to prove that the libellee was in fault, but also that it was free from fault in the matter. (Mr. Frank argues.)

Mr. Derby argues.

Mr. Watson argues.

The COURT.—A question of this kind has its difficulties, one of which has been alluded to by counsel, that in hastily looking over decisions sometimes

it is found that the ruling appears to settle some point, when an examination of the case more fully will show that it refers to an entirely different state of things. In regard to taking advantage of technical rules, it is evident that the sentiment of courts is constantly departing from the old straight adhesion to technicalities. Technicalities are useful extremely useful; they simplify practice and dispense with argument in certain cases, and waste of time, but technicalities as masters are apt to be injurious to the trial of cases, they have to be kept within bounds. The sentiment, I think, is growing rapidly to try a case and so far as it may be fair to both sides of the case to conduct trials with as much elasticity, I might say, as possible, in order that the case may be fully tried. It is no longer common to send a case out of court, or to destroy the progress of the case, by strictly adhering to some technical rule which would terminate the case, and one which has no principle of justice in applying it under those circumstances; it is no particular advantage to either party. In one case, a party with a good case might entirely lose its rights for want of some evidence which the Court hasn't authority to admit, and **[266]** it might diminish the advantage of the other side, but it would not defeat justice, a full hearing of the case. My view of a legal discretion is to see, as far as possible and in fairness to both sides, that a full trial is awarded to the parties in interest.

The technical question of rebuttal here is a difficult one to me, and there is a divergence in the decisions, but it seems to me that the authorities allow

a rebuttal of this kind, a proof of due care and good equipment in a general way, and that the ship is well manned, in a general way, even though there is an allegation of absence of negligence. There is a rule to allege that there has been due care on the part of the plaintiff, a general allegation, and that is sufficient supported by proof, and I feel that where this has been done, and special evidence has been put in of want of care, then it is the right of the libellants to rebut it.

On the general matter of discretion, I think this is a case to allow the evidence to go in, for the sake of having a full hearing. Neither party wishes to win its case by the suppression of some essential fact. The objection is overruled.

Mr. FRANK.—Exception.

F. W. KLEBAHN (Continued).

Mr. McCLANAHAN.—(To Reporter.) Read the question.

The REPORTER.—(Reading:) "Q. Can you state whether or not there was an officer on the after poop-deck of the 'Siberia' when she backed out on November 10th, 1905"? A. Yes, sir.

Cross-examination.

Mr. FRANK.—Q. Mr. Klebahn, when you visited buoy #1 on the occasion mentioned by you, just tell us again what the situation was with respect to the wire?

Mr. McCLANAHAN.—Object to that question, as indefinite.

The COURT.—Overrule the objection. [267]

(Testimony of F. W. Klebahn.)

A. In what respect would you like to know?

Q. I want to know the whole details of your visit there, and what you saw?

A. As I stated yesterday, I got a telephone message from pilot Lorenzen that buoy #1 was being picked up by the pile-driver. I stated yesterday that it was on the Monday morning after the "Siberia" went out, but I have refreshed my memory from my cash book, as to hack hire, and I find the hack hire was put down for Saturday, the 11th of November, and not on the 13th. I proceeded to the pilot-house and went with Mr. Lorenzen to the pile-driver which was moored near the lighthouse, and had the buoy with chain and wire attached to it hanging on the fall coming from the top of the pile-driver. A coil of wire was lying on the pile-driver, a shackle was lying on the pile-driver, talking of the pontoon of the pile-driver, and the wire which was attached to the chain of the buoy was also lying on the pile-driver with, I am positive one clamp attached to it.

Q. Is that all you saw?

A. That is all I saw.

Q. You just simply looked at this wire and this chain that lay on the pile-driver, and that is the whole substance of your observation?

A. Besides that Mr. Lyle and myself took hold of the loose end of the wire, which was leading out into the channel, and pulled it in to see whether we could pull it in or where it was leading to. When we pulled it in a short distance we noticed a piece of wood floating in the channel was coming towards the pile-

(Testimony of F. W. Klebahn.)

driver.

Q. How much did you pull in, of the wire?

A. It is hard to say; I should judge about from five to ten feet.

Q. And how much of the wire was lying on the pontoon? A. At least twenty feet.

Q. What did you notice, one clamp on it?

A. At least one clamp.

Q. At least one? A. Yes. **[268]**

Q. What else? A. A shackle.

Q. Now, how was the shackle fastened, that you saw there?

A. I couldn't tell you; I don't remember.

Q. To what was the clamp fastened, that you saw there? A. To the wire.

Q. To what part of the wire?

A. The wire which was lying on the pontoon.

Q. To a single line of the wire?

A. Two wires put together, and were held by this clamp that I saw; two wires.

Q. Two strands of wires?

A. Well, what I mean, here is a wire leading this way, and another going this way (showing with his hands), and the two were fastened together with this clamp.

Q. In other words, if I understand you rightly—I want to get the true import of that testimony. The two wires that you saw fastened by a clamp were running in the same direction as I hold these pencils now? (Showing with two pencils.)

A. You mean in opposite directions.

(Testimony of F. W. Klebahn.)

Q. No, in the same direction.

A. The way you are pointing it is opposite, one running this way and one that way.

Q. I will draw a diagram as I understand it, and that is the way we will probably get at it. I don't understand what you mean by running in opposite directions. (Draws diagram and shows it to the witness.) Does that indicate the manner in which you found the wire and the clamp?

A. This wire was extended. (Pointing.)

Q. Extended the full length of the other wire?

A. (The witness marks on the diagram to illustrate what is meant.) In other words, it was one wire, but two sections of it; that is one wire forming a noose or eye or whatever you call it. **[269]**

Q. And the clamp was in the position in which you have indicated it here?

A. As to holding the two wires together, yes.

Q. Now, indicate on this diagram that you have made, also the position of the shackle that you saw there?

A. I have told you before, Mr. Frank, that I don't remember how the shackle was located.

Q. Now, so that there shall be no mistake about this I am going to rub out these ends, so as to indicate what you contend is a continuous loop, as I understand it?

The COURT.—Let him draw it.

(The witness draws a diagram.)

Q. Now, just mark the diagram that you have made with a letter "A" inside of the noose?

(Testimony of F. W. Klebahn.)

A. (The witness does so.)

Q. And put the letter "B" where you indicate the clamp? A. (The witness does so.)

Q. Now, this diagram as I understand you, is all that you can testify to with respect to that wire and clamp. You only noticed one clamp and you don't know where the shackle was?

A. At least one clamp, and I know the shackle was in the wire, but I couldn't tell the exact position.

Q. You can't tell where the shackle was?

A. No.

Mr. FRANK.—Offer this paper (being the diagram just referred to) in evidence, and ask that it be received in evidence and marked "Libellee's Exhibit I."

The COURT.—That is allowed. The two diagrams represent the same thing I understand.

Mr. FRANK.—Q. Indicate the diagram that I drew as "C," Mr. Witness, for which you have substituted the other diagram?

A. (The witness does so.)

Q. Is that loop which you have indicated in this diagram, Exhibit I, the only loop that you saw there? **[270]** A. On the pontoon?

Q. Yes. A. Yes, sir.

Q. About what was the size of that loop, Mr. Klebahn?

A. Well, I wouldn't like to say exactly, but I should judge about in the neighborhood of three to five feet.

(Testimony of F. W. Klebahn.)

Q. It may have been as small as three feet, and would not exceed five feet?

A. I don't know about that, because there was too much wire on the pontoon.

Q. Then, you wouldn't be able to say definitely what the size was, but your best judgment about it is from three to five feet?

A. Not the exact size; the best recollection, as I said before, is from three to five feet.

Q. And do I understand you to say you saw no other loop? A. I did.

Q. Did you see another loop?

A. No; you understood me aright there.

Q. I understood you aright, you saw no other loop. How is it, Mr. Klebahn, that you have a recollection of a shackle there, and have no idea now where the shackle was placed or how fastened?

A. Because I remember distinctly the shackle on the pontoon in the wire, but I did not examine the location of the shackle at that time, and consequently cannot say where it was located on the wire.

Q. You don't know whether it was near to the clamp, or a long way from it?

A. Not on account of there being other wire there on the pontoon, and I didn't examine exactly where the location was.

Q. Was it drawn up and a large amount of it coiled on the pontoon?

A. As I told you before, at least twenty feet of wire was on the pontoon.

Q. And that is all of the wire that you saw?

(Testimony of F. W. Klebahn.)

A. With the exception of what we pulled in, Mr. Lyle and myself. **[271]**

Q. Four or five feet?

A. No; I said at least five feet, I should judge.

Q. How long did you remain there, Mr. Klebahn, making this examination?

A. Oh, I think I was there at least an hour.

Q. During that hour what were you doing?

A. Waiting for the other gentlemen to come.

Q. How were you passing your time?

A. Sitting around and talking.

Q. And how long was it before the other gentlemen came?

A. The first, I should judge, was about ten minutes, the second about half an hour, and the last one, Lieutenant Slattery, about three-quarters of an hour, before he came.

Q. And did you defer your examination into the matter until the last one came?

A. We examined everything very closely when we were all together.

Q. And the rest of the time you were simply waiting for their coming and didn't make examination until all were there together? A. Yes, sir.

Q. By "Yes, sir," you mean my statement is right? A. Yes, sir.

Q. Who were the other gentlemen that were there?

A. Captain Fuller, the harbor-master.

Q. Who else?

(Testimony of F. W. Klebahn.)

A. Mr. Lyle, who performed the diving the night before.

Q. Who else?

A. Superintendent Holloway.

Q. Who else?

A. Captain Lorenzen, with whom I went over, and Lieutenant Slattery, who was in charge of the dredging contract for the Federal Government.

Q. How long did you remain down at the dock, Mr. Klebahn, after the vessel started out?

A. About twenty minutes. **[272]**

Q. At the time that you left, I understand that you said before, that you didn't know she had picked up anything? A. No, sir.

Q. Had she gotten out?

A. No; she was clear of everything that I could see from the dock, of everything dangerous.

Q. So far as you knew? A. Yes, sir.

Q. She was still backing, was she not?

A. She was in her swinging motion.

Q. Still in her swinging motion when you left?

A. Yes, sir.

Redirect Examination.

Mr. McCLANAHAN.—Q. With reference to the direction of the swinging of the stern, was that towards the reef or away from it?

A. The stern of the "Siberia" when I left the wharf, she was going mauka, towards the old Pacific Mail wharf.

Q. Away from the reef? A. Yes, sir.

Q. I ask you, showing to you the diagram which

(Testimony of F. W. Klebahn.)

you have drawn, where the chain to the buoy was seen?

A. The chain to which this wire was attached?

Q. Yes.

A. In here somewhere. (Pointing.)

Q. Did the eye pass around the chain?

A. No, sir.

Q. Will you please put an "e" where you have testified approximately to the location of the chain?

A. (The witness does so.)

Q. Was the wire free from that chain, which you have located? A. Yes, sir.

Q. Was there no portion of the wire around the chain?

A. As I told you before, it was around the chain and laid on the pile-driver.

Q. You have just said it was free from the wire?

A. The noose, you were asking about.

Q. The noose was free from the chain?

A. Yes, sir. **[273]**

Q. Was the wire itself free from the chain?

A. As I stated before, it was connected with the chain.

Recross-examination.

Mr. FRANK.—Q. How do you mean it was connected with the chain, Mr. Klebahn? If I understand this diagram rightly, the chain was about the point "e," outside of the loop "A"; is that right?

A. The chain was here, at point "e," outside of the loop "A." This loop was lying on the pontoon while this end was running on the pontoon, but this

(Testimony of F. W. Klebahn.)

end (pointing) was leading out in the channel, and Lyle and myself were pulling it in, and off this end was a coil of at least twenty feet, laid on the pontoon of the pile-driver.

Q. Now, the chain was at the point "e," and the length of the wire which runs from say "a" to "b," out that way, was coiled back around the point "e," is that right?

A. That is, one goes around this way. The best thing will be for me to draw it.

Q. Just take another paper and draw the thing so as not to disturb this one now.

A. (The witness takes another paper, and draws.)

Q. Now, put the end leading out to the channel on your new diagram, mark the loop "A," so we will have it the same as the other. The chain is "e," and make the end of the line leading out into the water "g." Now, does that indicate the way which you wish us to understand the cable was around the chain?

A. With the exception of that it should be drawn near here (pointing). This part was lying on here.

Q. We want to get the fact as it is, Mr. Klebahn, and we want it so nobody will mistake it.

A. (The witness makes another diagram.)

Q. When you make the other make an exact copy of that (referring to **[274]** diagram just previously made by witness, on which erasures were made and for which this is to be a substitute), so we will get the letters the same. Letter it just the same as you have lettered the other?

(Testimony of F. W. Klebahn.)

A. (The witness does so.)

Q. Now, Mr. Klebahn, I am going to destroy this first one—the one, Mr. McClanahan, that the witness rubbed out. Now, as I understand you, on the diagram we have now "a" represents the loop of which you have been speaking? A. Yes, sir.

Q. "E" represents the position of the chain?

A. Yes, sir.

Q. "B" represents the position of the clamp?

A. The clamp.

Q. "G" represents the outer end of the rope?

A. Yes, sir.

Q. And when you say the loop was around the chain you mean it was in the manner here indicated, around the chain? A. About that.

Q. In other words, the chain did not go over the loop "a"? A. No, sir.

Q. But the chain was hanging down; and from the loop "A" the chain ran continuously around to "B" and out towards "G"—the wire, I mean?

A. The wire, yes, with the exception of this wire here, which was leading out towards the sea; at least twenty feet of it was coiled up here.

Q. That is, with the exception that the end "G" was coiled on the pontoon, about twenty feet of it, and then leading into the channel? A. Yes, sir.

Q. And all you saw of the rope, so far as things were certain, was the end where the loop "A" is; you saw one other end?

A. Only one loop, "A."

Q. And only one end of that rope, that you saw,

(Testimony of F. W. Klebahn.)

leaving out this question of the connection?

A. Yes, I only saw one end. **[275]**

Q. You saw only one loop, one end of that loop, and that loop wasn't around the chain?

A. The loop "A" was not around the chain.

Mr. FRANK.—We offer this diagram in evidence.

The diagram was received in evidence and marked Libellee's Exhibit "K."

(At this point a recess was taken and the hearing of the above-entitled cause was continued until 2 P. M.) **[276]**

AFTERNOON SESSION.

March 21, 1907.

[Testimony of C. S. Holloway, for Libelant (in Rebuttal).]

C. S. HOLLOWAY, called as a witness on behalf of libellant on rebuttal, being duly sworn, testified as follows:

Direct Examination.

(Mr. McCLANAHAN.)

Q. You are the Superintendent of Public Works for the Territory of Hawaii, Mr. Holloway?

A. I am.

Q. Did you hold that office in November, 1905?

A. Yes.

Q. Do you remember the accident to the "Siberia" in that month? A. I do.

Q. Do you remember a visit made the day after the accident to a buoy in front of the lighthouse?

A. Yes.

(Testimony of C. S. Holloway.)

Q. What did you find when you went to the buoy at that time—oh, did you go out to the buoy at that time? A. I did.

Q. What did you find when you went out to the buoy at that time?

Judge STANLEY.—Objected to as incompetent, irrelevant and immaterial, not rebuttal of anything brought out by us.

The COURT.—Overrule the objection.

Judge STANLEY.—Exception.

A. I found one of the territorial pile-drivers near the lighthouse which had been used in hauling up the buoy and the buoy was suspended in the upper rigging, what you might call the derrick of the pile-driver, and several men on the pile-driver.

Q. Was there anything extending from the bottom of the buoy? A. There was. **[277]**

Q. What was it? A. A chain.

Judge STANLEY.—It is understood that this objection runs to all this line of evidence and the Court makes the same ruling and we are allowed the same exception.

The COURT.—Yes.

Mr. McCLANAHAN.—Q. What was on the chain, if anything?

A. Well, the chain was hanging from the buoy, the buoy was on the chain, that is my recollection.

Q. What did you go out there for Mr. Holloway?

A. It had been reported to me by Captain Fuller that there was a cable around the chain.

Q. Did you find the cable around the chain?

(Testimony of C. S. Holloway.)

Judge STANLEY.—I move that the last answer be stricken out as hearsay.

The COURT.—That is simply the reason why he went.

The COURT.—Q. You went out in consequence of a report from Captain Fuller in regard to this buoy?

A. The report that there was a cable around the buoy.

Judge STANLEY.—That is what we want stricken out.

The COURT.—Leave out everything, Mr. Holloway, except the immediate reason why you went out.

A. I went out on his report that there was a cable around the buoy.

Judge STANLEY.—I move that that be stricken out.

The COURT.—Captain Fuller reported something about the buoy and you went out there?

A. Yes.

The COURT.—The rest of the answer may go out.

(Mr. McCLANAHAN.)

Q. What did you find, Mr. Holloway, after reaching the buoy with [278] reference to the report that took you out there?

A. To the best of my recollection I found a cable which was around the anchor chain, a portion of the cable was lying on the pile-driver.

Q. What size cable was this?

A. I could only say that I think it was about one inch.

(Testimony of C. S. Holloway.)

Q. Did you see anything else besides cable?

A. Yes, I saw ropes and what are known as clamps.

Q. Did you see anything else besides clamps?

A. And a shackle.

Q. How many clamps did you see?

A. I couldn't testify as to the exact number. I know I saw more than one.

Q. Did you handle those clamps?

A. I lifted up the cable to which one of the clamps was attached, off the floor of the pile-driver.

Q. Was the clamp old or new that you lifted up?

A. The clamp was new practically.

Q. How do you know?

A. Well, because in the first place it was smooth and had fresh, bright paint on it. It couldn't have been an old clamp repainted, it would have shown some signs of pitting which it didn't.

Q. Where did the other end of the wire run to?

A. I think the wire was running on the boat back and forth on the floor and then into the water.

Q. Running where, in which direction did it point in the water?

A. It was on the end of the pile-driver. The pile-driver was facing out towards the outer channel or in that direction towards what I call the Quarantine wharf.

Q. That is the old Quarantine wharf, the channel wharf? [279] A. Yes, the Channel wharf.

Mr. McCLANAHAN.—Cross-examine.

Mr. FRANK.—No questions.

(Testimony of C. S. Holloway.)

The COURT.—Question. You say this wire cable was one inch in size?

A. I didn't caliper it, but about, I should say, one inch.

The COURT.—Q. One inch in diameter or in circumference? A. One inch in diameter. [280]

[Testimony of Captain Fuller, for Libelant (in Rebuttal).]

Captain FULLER, called as a witness on behalf of libellant in rebuttal (having been previously sworn as a witness in the main case), testified as follows:

Direct Examination.

(Mr. McCLANAHAN.)

Q. Captain, with reference to the depth of the water lying between a point Waikiki of the marine railway and the buoy No. 2 in its original position in November, 1905, what have you to say, was the water deep or shallow?

Mr. FRANK.—This is subject to our objection that it is incompetent, irrelevant and immaterial and not rebuttal.

The COURT.—Is that the line on which the boys testified?

Mr. McCLANAHAN.—(Showing on map.) Here is the line which Monoghan was told to fix the dredger at on cross-examination. Here is the working of the dredger on November 4th (pointing).

The COURT.—Overrule the objection.

Mr. FRANK.—Exception.

A. That means outside of the "Mokulii"?

(Testimony of Captain Fuller.)

Q. Outside of the "Mokulii."

A. Deep water.

Q. For the whole distance in a straight line across? A. Yes.

Q. What do you mean by deep water?

A. Well, the plateau of the harbor, 27 feet.

Q. Would it be in any place less than 27 feet on that course?

A. Near the dolphins in the marine railway we have 22 feet of water, say.

Q. 22 feet at the dolphins? A. Yes.

Q. Any other place where it would be less than 27 feet on that course?

A. No, I think it would be 27 feet right across, sir. **[281]**

Q. How about the middle of the channel?

A. That is 27 feet in the harbor; before the harbor was dredged the plateau was about 27 feet, sometimes 24, sometimes a little less in different places.

Q. How do you account for ships of 28 feet draft and more navigating the harbor with 27 feet of water?

Mr. FRANK.—What kind of an examination do you call that? We object to that as irrelevant and incompetent.

The COURT.—Overrule the objection.

Mr. FRANK.—Exception.

A. Well, at high water the vessels could go from the harbor with that depth of water. They couldn't at low tide.

Q. What is the nature of the bottom of the har-

(Testimony of Captain Fuller.)
bor, what was it at that time?

A. The nature of the bottom?

Q. Yes. A. Mud.

Q. Mud? A. Yes, mud.

Q. Do you remember visiting the buoy in front of the lighthouse which we will consider buoy number 1 on the day after the accident to the "Siberia"?

A. Yes, sir.

Q. What did you go out for?

Judge STANLEY.—Object to it as incompetent, irrelevant and immaterial and not rebuttal.

The COURT.—Objection overruled.

Judge STANLEY.—Exception.

Judge STANLEY.—It is understood that this objection applies to this whole line of the testimony and same ruling and same exception.

The COURT.—Yes. **[282]**

A. To buoy No. 1?

Q. Yes. A. Well, may I tell a story?

Mr. McCLANAHAN.—If it answers the question; yes.

A. It would lead up to it. When the "Siberia" got into trouble that night I was thinking it over after I got home and I thought to myself then that under the circumstances I would take up buoy No. 1, so in the morning I sent the dredger with the proper people to lift up buoy No. 1—

Q. The dredger or the pile-driver?

A. The pile-driver, for fear that there might be some more trouble. They went at it and hooked on to buoy No. 1—

(Testimony of Captain Fuller.)

Q. Were you there on the pile-driver?

A. No, I was not there myself.

Q. Now, you wanted buoy No. 1 lifted?

A. Yes.

Q. When did you then next have anything to do with it?

A. The pilot office telephoned to me that there was a wire on the chain and I took a boat from the boat landing and went to the pontoon of the pile-driver, and then I saw the wire and one thing or another and I went after Mr. Holloway and afterwards after Lieut. Slattery, knowing that he had charge of the operations. It was intimated that I was to blame for having that buoy in the harbor before that and that is what made me think about buoy No. 1.

Q. How large a wire was this that you found?

A. You mean the wire around the chain?

Q. Yes. A. About one inch.

Q. Diameter or circumference?

A. Diameter.

Q. Did you see anything besides the wire in connection with the wire?

A. Well, I saw a clamp on the wire. [283]

Q. Was it a new or an old clamp?

A. It looked to be quite fresh.

Q. Where did the other end of this wire run to?

A. Well, there was one end running to the channel.

Q. Did you see anything else on the wire?

A. No, I didn't pay any particular attention to

(Testimony of Captain Fuller.)

it, only I saw that the end was there; then I thought to myself I will go after Holloway and Lieut. Slattery to have these people there. I didn't want to be held responsible in this matter. I get my dose once in a while.

Cross-examination.

Mr. FRANK.—Q. Do you know what the location of this buoy No. 2 was with reference to a bight in the contour of the reef there?

A. Yes, I do, sir.

Q. Was it in the bight, did the bight run out alongside the buoy? A. No.

Q. You don't think so. A. No.

Q. Did you go over there, did you have occasion to go over there frequently, or did you send someone else?

A. My assistant goes there once in a while and I go there. That buoy had been lying there for a great many months and we had used it for a mooring buoy all the time, Mr. Frank, it is in 24 feet of water.

Q. Wasn't there a bight running around that buoy in the reef—and to show you what I mean I will show you a map. (Showing witness Libellee's Exhibit "E.") Do you know this map?

A. Yes, sir.

Q. Now, on this map—do you not remember a bight of shoal water—that buoy was situated in a bight—here is the lighthouse [284] down here (showing).

A. What is the Ewa side of the harbor?

Q. Here. Here is the lighthouse (showing).

A. Where is buoy No. 1? No.

(Testimony of Captain Fuller.)

Q. You don't remember that, Captain?

A. No.

Q. You don't know anything about that at all?

A. I know something about that; yes.

Q. Do you know anything about these soundings —Young Brothers island and Quarantine wharf are here (showing) here is Alakea wharf, Likelike wharf is here (showing).

A. The buoy is here in this neighborhood in a line with the Likelike wharf.

Q. Do you understand the situation on the map?

A. I understand the buoy is here (showing).

Q. Just mark that, will you, just put a dot where you think that buoy should be.

A. (The witness does so.)

Q. Just mark with an arrow with "F."

A. (The witness does so.)

Q. That is where you put the buoy?

A. I think so; that was buoy No. 2, wasn't it?

Mr. FRANK.—Yes, it is buoy No. 2 we are talking about.

Redirect Examination.

Mr. McCLANAHAN.—Q. How deep is the water at buoy No. 2? A. At buoy No. 2?

Q. Yes. A. 24 feet.

Mr. McCLANAHAN.—Now, I would like to ask the indulgence of the court. I omitted to ask the captain a question that should have [285] come out on direct examination.

The COURT.—What question is it?

Mr. McCLANAHAN.—It is a matter that I wish to

go into that I should have gone into on direct examination.

The COURT.—Will you state the nature of it.

Mr. McCLANAHAN.—The Court will remember that the boys, all four of them, and Monaghan said that on November 4th when they went in a launch to the buoy that there was a ship on the Ewa side of the buoy. I want to show what ship that was and when it was moored there and when it was taken away. It is simply explanatory of what these boys and Monaghan could not explain. The evidence shows that Captain Tripp took the "Mary E. Foster" on the 10th of November and moored her on the Ewa side of this buoy. The boys have stated that on November 4th there was a ship lying there. I want to show what ship that was and that she was taken away and that the "Mary E. Foster" was another ship afterwards put there.

Mr. FRANK.—We object to it and will take your Honor's ruling.

The COURT.—Overrule the objection.

Mr. FRANK.—Exception.

Mr. McCLANAHAN.—Q. Captain, do you remember the mooring of the "Mary E. Foster" Ewa of buoy No. 2? Do you remember the time she was moored? A. Yes I do.

Q. What time was that?

A. The 10th of November.

Q. What year? A. 1905.

Q. What ship was moored there immediately before that in the same place?

(Testimony of Captain Fuller.)

A. The "S. D. Carleton."

Q. When was the "S. D. Carleton" taken to that mooring ground?

A. (Consulting book.) Well, on the first of November.

Q. Of what year? A. 1905. **[286]**

Q. When was she removed from that mooring ground? A. To go to sea?

Q. Yes.

A. (Consulting book.) November 6th.

Q. 1905? A. 1905.

Mr. McCLANAHAN.—That's all.

Mr. FRANK.—That's all. **[287]**

[Testimony of Captain Lorenzen, for Libelants (in Rebuttal).]

Captain LORENZEN, called as a witness on behalf of libellants in rebuttal (having been previously sworn as a witness in the main case), testified as follows:

Direct Examination.

Mr. McCLANAHAN.—Q. Captain, in a course commencing Waikiki of the marine railway and extending to buoy No. 2 in front of the bow of the "Mokulii" is the water deep or shallow?

Judge STANLEY.—The same objection as interposed before; it is not rebuttal.

The COURT.—Overrule the objection.

Judge STANLEY.—Exception.

Mr. McCLANAHAN.—Q. Is the water deep or shoal? A. The water is deep.

Q. For the whole distance?

(Testimony of Captain Lorenzen.)

A. For the whole distance.

Q. What do you mean by deep water?

A. Well, from 28 to 30 feet, as much as at any part of the harbor.

Q. How deep is the water at the buoy itself?

A. At buoy No. 2?

Q. Yes. A. About 24 feet.

Q. In that course, Captain, is there any water 5 feet deep? A. No.

Q. Is there any water in a line from the buoy just in front of the bow of the "Mokulii" Waikiki five feet deep? A. No.

Q. Anywhere in the harbor in a line—in front of a line running from buoy No. 2 just across the bow of the "Mokulii"? [288] A. No.

Q. If you started from a locality adjacent to the marine railway on the Waikiki side towards buoy No. 1, in order to get 5 feet of water, which end of the "Mokulii" would you have to pass, the bow or the stern? A. Have to pass the stern.

Q. You say the water in that course would be 28 feet in places. You have also testified, have you not, that you would pass over a course like that in the maneuver of the "Siberia"? A. Yes.

Q. How could you maneuver the "Siberia" in 28 feet of water if she draws 28 feet two inches?

The COURT.—Well, he said 28 to 30 feet.

Q. Can you maneuver the "Siberia" in 28 feet of water if she is drawing 28 feet 2 inches in Honolulu harbor?

A. If the vessel was maneuvered drawing 28 feet

(Testimony of Captain Lorenzen.)

2 inches and there was only 28 feet of actual water and probably two or three feet of soft mud I could maneuver the vessel all right.

Mr. FRANK.—I fail to see that that rebuts anything.

The COURT.—It doesn't rebut anything; that question was allowed in the discretion of the Court as in the case of Captain Fuller.

Mr. McCLANAHAN.—Q. Captain, would it have been possible, standing at the end of Naval Dock No. 2 on the afternoon or evening of November 10 when the "Siberia" passed out, to have seen from the Naval Dock No. 2 at the end buoy No. 2?

Mr. FRANK.—Object to that. In the first place the witness isn't shown to have been on Naval Dock No. 2 at that time and the testimony shows that where he was, from his position he couldn't see the buoy. How could he tell about anybody else's position, what they could see. [289]

The COURT.—I will sustain the objection; it doesn't follow that because he was in one place and didn't see it he couldn't see it in another.

Mr. McCLANAHAN.—Exception.

Q. I will ask you, Captain Lorenzen, whether that buoy could be seen easier from the position that you looked for it than it could be seen from the end of Naval Dock No. 2 if you were standing on the dock.

Mr. FRANK.—Same objection.

The COURT.—Of course if evidence is admissible

(Testimony of Captain Lorenzen.)

the fact that it has very little weight don't exclude it.

Mr. FRANK.—We contend it is not admissible.

The COURT.—Overrule the objection.

Mr. FRANK.—Exception.

A. Yes.

Q. Now, I will ask you if it were possible for a man standing on Naval Dock No. 2 on the end to have seen buoy No. 2 as located in its changed position back of the "Mokulii"?

Judge STANLEY.—Object to that on the same grounds, that is what the Court has already ruled out.

The COURT.—I will allow the question.

Mr. FRANK.—Exception.

A. I don't think anybody could have seen it from the Naval Dock; I couldn't see it from where I stood.

Q. Captain, do you remember the morning after the accident to the "Siberia" going out to buoy No. 1 in front of the lighthouse? A. Yes.

Q. What did you find when you went out there?

Judge STANLEY.—Same objection as before, incompetent, irrelevant and immaterial and not rebuttal.

The COURT.—Overrule the objection.

Judge STANLEY.—Exception. With the understanding that the same objection, ruling and exception applies to this line of evidence [290]

The COURT.—It is so understood.

A. I found the pile-driver having a hold of No.

(Testimony of Captain Lorenzen.)

1 buoy hoisted up out of the water and a wire attached to the chain underneath.

Q. Did you find any wire on the pontoon, on the pile-driver's pontoon?

A. There was some wire on the pontoon, on the pile-driver itself.

Q. Where did the other end of the wire extend?

A. Well, from the way it pointed from the pile-driver it pointed about over towards the Myrtle boathouse.

Q. What sized wire was that?

A. I should say about what we call three-inch wire, a one-inch diameter wire.

Q. Can you say whether you saw anything else in connection with the wire at that time?

A. Well, I don't know, the lighthouse, I guess.

Q. Anything in connection with the wire?

A. I saw a float out near the end of the wire.

Q. Did you see anything in connection with the wire while it lay on the pile-driver?

A. I saw a couple of clamps on the wire where the wire was doubled over there were two iron clamps fastened.

Q. Did you see anything else?

A. I think that was all.

Q. Were these clamps old or new?

A. They appeared to be new and in good condition.

Q. What made you think they were new?

A. Well, they didn't look rusty or as if they had been in the water a long time, they hadn't been in

(Testimony of Captain Lorenzen.)
the water very long.

Mr. McCLANAHAN.—Now, in order not to have the Court think that I am attempting to get in evidence that the Court has seemingly ruled on before, I want to make an offer to prove by Captain [291] Lorenzen that some months after the accident to the "Siberia" while he had charge of the French Man of War "Catinat," he picked up on the starboard and port anchors of the "Catinat" while she lay near her berth in Honolulu Harbor two wires belonging to the dredger "Pacific" and that on neither of them were there any floats. I make this offer because it is distinguished from my other offer on which the Court has ruled; I attempted to show by Captain Tripp that he had picked up wires. I think the clear inference to be drawn from the evidence offered by claimants is that to all of their submerged wires they attached floats at the end. I think that is clearly to be drawn from their evidence in this case. I don't know whether it is alleged specifically in their answer or not, but clearly it is brought out by Spencer that they always attached floats to their sunken wires.

(Mr. McClanahan argues.)

Judge STANLEY.—May we ask counsel how many months after this was?

Mr. McCLANAHAN.—It was in June while the work was being done in the harbor.

Judge STANLEY.—About seven months then; we object to that as incompetent and immaterial and not rebuttal.

(Testimony of Captain Lorenzen.)

The COURT.—Sustain the objection.

Mr. McCLANAHAN.—Exception.

Cross-examination.

Mr. FRANK.—Q. Captain, your business in the harbor here has been to navigate large vessels or rather vessels of the size of the Inter-Island boats and larger ones? A. Yes, sir.

Q. You haven't been engaged in any other business about the harbor? [292] A. No.

Q. In your business have you ever had occasion to go over to this reef at the other side of the harbor except in those boats for the purpose of navigating them back and forth? A. Yes.

Q. In what way?

A. Every now and again we take our pilot boat and go and take soundings around the harbor and in the channel.

Q. Do you make a memorandum of these soundings? A. Yes.

Q. Where is the memorandum of these soundings?

A. We don't keep the memorandum except at the time. We keep it in our head.

Q. How long had you made any such soundings previous to the "Siberia's" going out?

A. I wouldn't be able to state the exact date because we did it every now and again.

Q. I do not ask for the exact date, but give me the approximate period of time.

A. Well, that I couldn't say, probably within may be from one to three months.

(Testimony of Captain Lorenzen.)

Q. Now, these soundings that you made were made for the purpose of seeing whether there was water enough to float your vessels?

A. Yes, sir.

Q. And you would only make these soundings in acknowledged deep water?

A. Yes, we wouldn't go away up in shoal water.

Q. And you wouldn't go inside of a bight where this buoy was, passing over shoal water if there was any there?

A. We would go up to the buoy and find if there was any shoal water mauka from the buoy towards the wharf. We would go as far as the buoy, and perhaps any vessel that we moored, they **[293]** would have a man at the stern with a lead to see how far we could go.

Q. Did you ever have occasion to go to the buoy with a large vessel?

A. Yes, right past there, right up alongside of the buoy. I have had the "Gaelic" and several other steamers anchored there.

Q. How far from the buoy?

A. Well, it is pretty hard to judge distances, maybe from 25 to 50 feet from the buoy.

Q. Towards the wharves?

A. No, we had the buoy—come up alongside and go down past the buoy, the buoy was 25 to 50 feet away from the ship's side.

Q. The ship would be from 25 to 50 feet towards the wharves away from the buoy? A. Yes.

Q. That is as near as you think you ever came?

(Testimony of Captain Lorenzen.)

A. Yes, we would swing past the buoy with our stern, swinging past the buoy.

Q. How long ago was that?

A. We have done that on several occasions.

Q. Well, how long ago was the last occasion?

A. I am not able to state how long ago; I couldn't tell.

Q. Give me an approximate idea—three or four or five years?

A. Well, probably two or three or four years, I think off and on at different times; we don't take any note of these things, we moor the vessels.

Q. Do you mean the last time you did that was two or three or four years ago?

A. It was previous to the occasion that I took the "Siberia" out.

Q. How long previous to the occasion?

A. I am not able to state. **[294]**

Q. Well, one or two or three years?

A. I am not able to state the time.

Q. Is it a long period of time so that it might be one or two or three years before?

A. I couldn't state that because I say it has been during my term as pilot in the regular service I have done it several times, but I couldn't state the exact time.

Q. It is so long ago and so infrequent that you haven't got the time impressed on your memory sufficiently to say if it was within a period of from one to three years; is that it?

A. Probably not.

(Testimony of Captain Lorenzen.)

Q. Will you kindly step down off the stand and come here and examine this map? (Showing Libellant's Exhibit "E.") Are you acquainted with that map of the harbor?

A. I don't know. If I get things located the Marine railway is here, here is the channel wharf, and the lighthouse is here and the buoys (showing) —Yes, I think I am.

Q. Now, will you take the red lead pencil that I give you and put down on that map the position where you think buoy No. 2 that we have been talking about would be in its original location?

A. I placed it on that map there. (Indicating another map.)

Q. I am asking you to place it on this map.

The COURT.—There is the new quarantine wharf. (Showing.)

The WITNESS.—The whole location is changed. The only thing I can go by is the Likelike wharf. The buoy was about out on a line from this little short cut on the Waikiki side.

Q. Well, put a pencil mark where you think it would be. A. I would like a rule.

(The clerk hands rule to the witness.)

A. (Continuing.) It would be approximately on this line as I have got it here now (showing with rule; the witness draws the **[295]** line with the red pencil.)

Q. Now, with that line as a guide put a dot where you think that buoy would be.

A. (The witness does so.) I should think it

(Testimony of Captain Lorenzen.)

would be about there—according to the draft of the water.

Q. You are going by the draft of the water?

A. That is all I am going by. I have no way of measuring it on there.

Q. You have no other means of locating it than because you see the figure 24 there. That is the reason you put it there? A. Yes, sir.

Q. And if that is so why do you put it to the southward of the figure 24?

A. I put it simply on this side because I think it should be a little this side (showing) but the pencil line was so broad it made it right on the line and consequently I marked it over here.

Mr. FRANK.—I have marked now an arrow pointing towards the dot in the neighborhood of the "24" near which I have marked "L"; that is the place where you wish to locate the buoy is it?

A. I have located the buoy there.

Q. As I understand you, you made that location simply because you saw the soundings there 24?

A. There is no other way to find it unless I actually went over in a boat on the same line and got to such a draft; I would say that is the buoy from the bearings and draft of the water.

Q. You don't do it by bearings and distances?

A. Yes, bearings and distances.

Q. In this case it is by bearings and draft of the water.

A. Simply because I have no way of locating the buoy any other way with distances. **[296]**

(Testimony of Captain Lorenzen.)

Q. Now, with reference to seeing that buoy on the morning of November 10, with reference to your testimony with respect to the facility with which a person could see that buoy on the morning of November 10 from the end of Naval Dock, you say you don't think he could. Was that because you couldn't see it from the ship?

A. Yes, that is right.

Q. And that is the only reason that you have for saying that he couldn't see it from there?

A. Because I was in a better position.

Q. You have testified that you looked for it on the stern and didn't see it? A. I have.

Q. And on that reason and that reason alone you say that a person standing upon the Naval Dock couldn't see it? A. That is right.

Mr. McCLANAHAN.—Object to that. Submit that the witness hasn't said that. He said that because he was in a better position. That is not fair to the witness.

The COURT.—Overrule the objection.

Mr. FRANK.—I object to the statement that I am being unfair to the witness. I want the witness to understand that I am not trying to mislead him in any way.

Q. As I understand you, you testified that a person couldn't see it from the end of that wharf because you on the vessel when you looked for it didn't see it? A. Yes.

Q. That is all there is to it, isn't it?

A. All there is to it, yes.

(Testimony of Captain Lorenzen.)

Redirect Examination.

Mr. McCLANAHAN.—Q. How far mauka from the reef or shoal water did this buoy [297] No. 2 ride?

Judge STANLEY.—Objected to as not proper redirect examination.

The COURT.—Overrule the objection.

Mr. FRANK.—Exception.

Mr. McCLANAHAN.—Q. How far mauka from the reef or shoal water was the buoy No. 2 in its original position?

A. I could not tell, I never measured it.

Q. Can you approximate that?

The COURT.—Answer yes or no.

A. I don't think I could except whether it was 100 feet or 500 feet, not anyways near.

Mr. McCLANAHAN.—Q. Can you do so within 50 feet, was it 50 feet from the shoal?

A. I should say it was between 100 and 150 feet. Of course this is not absolutely sure, because as I said before I have never measured it.

Recross-examination.

Mr. FRANK.—Q. As a matter of fact, Captain, you don't know anything about the distance except the mere guess you are making?

A. A mere guess, because hauling a vessel down there we don't go by the buoy, we go by the draft of the vessel.

Q. Then when you name this distance you don't know anything about it except that you are guessing, is that right? A. That is all.

(Testimony of William Pololu.)

(At this point an adjournment was taken until 10 o'clock A. M., March 22d, and the hearing of the above-entitled cause was continued until 10:30 A. M., March 22, 1907.) **[298]**

MORNING SESSION.

March 22, 1907.

[Testimony of William Pololu, for Libelant (in Rebuttal).]

WILLIAM POLOLU, called as a witness on behalf of libellant in rebuttal, being duly sworn, testified as follows:

Direct Examination.

(Mr. McCLANAHAN.)

Q. What is your name?

A. Willie Pololu.

Q. How old are you? A. About 21½.

Q. Where do you live?

A. Corner Pauoa Road and Nuuanu.

Q. Where were you living in November, 1905?

A. In Honolulu.

Q. Did you at any time in November, 1905, work on a pile-driver? A. Yes.

Q. What pile-driver was it?

A. The Government pile-driver.

Q. Did you know a buoy in front of the light-house in Honolulu harbor? A. Yes.

Q. Did you have anything to do with that buoy while you were working on the pile-driver?

A. Yes.

Q. What did you do?

(Testimony of William Pololu.)

Judge STANLEY.—Same objection as we had before that it is incompetent, irrelevant and immaterial and not rebuttal.

The COURT.—Overrule the objection.

Judge STANLEY.—Exception.

A. Pulled that buoy up,—that chain.

Mr. McCLANAHAN.—Tell the Court all that you did with that buoy and that chain. Talk to the Court and tell just what you did. You say you pulled the buoy up? [299]

A. No, we didn't pull up, we pulled a chain and got the buoy.

Q. How did you get hold of the chain?

A. Of the cable wire or the rope?

Q. You say you pulled the chain up?

A. Yes.

Q. How did you pull it up?

A. Pulled with the winch.

Q. How did you make fast to the chain?

A. With a rope.

Q. How did you get the rope on the chain?

A. Well, about with a half hitch on the chain.

Q. How did you get the rope on the chain, how did you tie the rope to the chain?

A. The buoy up this way and the cable wire—

Q. Before the buoy was pulled out of the water how did you get the rope on the chain?

A. I dived down.

Q. When you dove down what did you find, if anything, on the chain?

A. Yes, I saw a cable wire.

(Testimony of William Pololu.)

Q. Where did you fasten the rope with reference to the cable, above it or below it on the chain?

A. Below the cable wire.

Q. Did you notice how this cable wire was fastened to the chain when you dove down?

A. Well, I didn't see where the cable wire, how it was fastened. When they pulled it up on the pile driver that is the time I saw it.

Q. When you dove you did not see how it was made fast but when it was pulled up on the pile-driver you did? A. Yes.

Q. Was the cable made fast close to the chain? [300]

A. Yes.

Q. Do you think you could tell us how it was made fast to the chain? A. Yes, sir.

Q. You have seen this wire before, haven't you? (Showing small piece of wire with clamps and shackle attached.)

A. No, I didn't see that wire before; just now I saw it.

Q. Just now; will you please take this wire and show how that wire cable was made fast to the anchor chain? A. Yes.

Mr. FRANK.—I suggest that this would be leading, that is suggestive. If he wants the witness to testify to anything let him take it all apart and give it to him.

Mr. McCLANAHAN.—Did you see how it was fastened? I believe you answered that you did, after the wire was brought up. Will you please tell

(Testimony of William Pololu.)

how it was fastened?

A. The wire with the chain?

Q. How the wire was fastened to the chain?

A. I couldn't tell you particularly. Of course I don't know, I will tell you how, some rope—

Q. Can you tell it in Hawaiian?

A. Yes; I don't know the English.

Q. Well, do the best you can to tell how it was fastened.

A. The chain ran this way, and the cable wire was put this way and then put an eye with small shackle, two little shackles, they make one eye and they tied that like this and put a shackle this way, two little shackles, and they put the other like this with a shackle around the chain and the two little shackles goes through that big shackle and close to the chain.

Mr. McCLANAHAN.—(Taking a piece of wire and some string.) We will call this the anchor chain (indicating piece of wire **[301]** held perpendicularly). Now will you take this and show the Court how it was made fast.

A. First this way, here they put two little shackles here, one over here (showing).

Mr. McCLANAHAN.—The witness is now making an eye.

The WITNESS.—They put two little ones on here, but this is too short that wire about a foot or two feet and this way here, and one shackle comes this way here.

Mr. McCLANAHAN.—The witness is now illus-

trating that the eye is connected to the main wire by another shackle.

The WITNESS.—They go this way. The shackle, the two little shackles here and one over here and one big shackle this way, and they put a pin this way and one small shackle that goes there, one little one goes this way and they put one a little more on the other end and run in a chain, that cable, with the shackle they run in with the chain and that is the way they hold it (illustrating with string and wire).

Mr. McCLANAHAN.—And that is the way it was made fast. We will assume that this wire—you understand this wire has two shackles here (showing). A. Yes.

Q. Now, take that wire and use this piece as anchor chain and show how it was put on.

A. Here is the pin, this pin here (showing). This is the way they hold the chain while this shackle was right in here, these two shackles, because that shackle is big and only the pin is small over here, this one is more long, they put one little one here and put here the chain.

Mr. McCLANAHAN.—The witness is illustrating that the pin here is fastened on this side with another pin that goes through it in its diameter; is that right? [302] A. Yes.

Q. Was there any knot on that?

A. No knot.

Q. A pin? A. A pin on the end.

The COURT.—The shackle that makes the slipping loop is fastened with a pin instead of a knot?

(Testimony of William Pololu.)

Mr. McCLANAHAN.—He says it was large enough for this smaller shackle to go through it, the small shackles had gone through the large shackles, that is the eye was much larger than this shows.

Mr. FRANK.—He means that the clamps pull through the shackle to the other side of the shackle.

Mr. McCLANAHAN.—Exactly.

Q. When the buoy had been lifted up, the anchor chain had been lifted up, did you do anything with the wire?

A. Well, I know that time I pulled up the wire I looked, that is the time I saw the wire was tied like that and I didn't go there any more afterwards.

Q. Did you have anything to do with the wire after it had been pulled up?

A. No, I go over there and looked at it but I didn't touch it.

The COURT.—What was done with the wire?

A. Well, some men they pulled that. They came over there and held the wire up and I went over and hauled the rope on the pile-driver. That is all I did.

The COURT.—And where did they put the wire?

A. They put it on the scow.

Mr. McCLANAHAN.—Q. Did you, after you made fast the rope to the chain, after that make fast a rope to the wire? A. Yes.

Q. Well, now, tell us about that. [303]

A. Well, about the rope and the chain, the cable and the chain?

Q. Yes.

A. I tied the rope on the chain and I pulled out

the buoy, and afterwards I got and tied a rope on the cable wire and then pulled it out with the winch.

Q. How did you reach the wire cable in your tying of the rope to the cable?

A. I went on a boat.

Q. What kind of a boat?

A. A small boat down there; I don't know what you call that kind of a boat.

The COURT.—Was it a rowboat?

A. A rowboat.

Mr. McCLANAHAN.—Q. Which direction did that wire which you tied the rope to lead? Do you understand the question?

A. No, I don't understand that.

Q. This cable that you tied the rope to, where did the other end of it go? A. The rope?

Q. No, the cable. A. The cable in the sea?

Q. Yes. A. It go this way.

Q. Towards what?

A. Out near the Myrtle Boathouse. Well, I don't know if it went right near there.

Q. It went towards there?

A. Yes, I saw it across there.

Cross-examination.

(Mr. FRANK.)

Q. Pololu, who else was on the pile-driver besides yourself? [304]

A. Me and Mariana, one Portuguese—

Q. Where is Mariana? A. He is outside.

Q. Who else? A. And Keawe.

Q. Who is Keawe? A. A. Kanaka.

(Testimony of William Pololu.)

Q. And only you three?

A. There was some more, I forget.

Q. Who had charge of the pile-driver?

A. Keawe.

Q. Keawe had charge of it? A. Yes.

Q. Now, after you had taken up this wire when did you first speak to anybody about it?

A. No.

Q. What do you mean by no?

(The Court translates the question into Hawaiian.)

A. That time I came home up here.

Q. After you took this wire up when did you first speak to anybody about it? When did you talk it over with anybody?

A. No, I never talked with anybody. I talked about work, that is all.

Mr. McCLANAHAN.—I submit we should have an interpreter.

Mr. FRANK.—The Court will interpret if necessary any question.

Mr. McCLANAHAN.—I am perfectly willing to have the Court interpret.

(The Court interprets the last question.)

A. With nobody.

Q. You never spoke to anybody at all about this from that time up to now? A. No.

(Question repeated by the Court in Hawaiian.)

A. I think about last week one fellow came and asked me, my boss [305] before Jim Morse came, and asked about this cable wire, if I had seen it. I said yes.

(Testimony of William Pololu.)

Q. And is that the first time from the time in November that you took it up up to the present time that you spoke to anybody about it?

(Question interpreted by the Court.)

A. I didn't speak before that to anyone.

Q. Now, what did Morse say to you?

A. Well, he say to me if I went out there to pull that chain and cable wire up. I said, yes, I was on the pile-driver and I dived down myself.

Q. What did he say then?

A. He said if I know him. I said yes; that is all I said.

Q. That is all you said? A. Yes.

Q. What did he say to you then?

A. He said to me that is all he wanted. He wanted to know if I was out there.

Q. That is all he said? A. Yes.

Q. Who spoke to you next?

A. No, nobody speak to me.

Q. Now, are you sure of that, that you never spoke to anyone from the time that you spoke to Mr. Morse as you have just related until you told this story on the stand? (Question interpreted.)

A. I haven't spoken of it only yesterday I was sent for to come here and testify.

Q. Before you came here and testified did you talk it over with Mr. McClanahan?

A. Yes, to-day I talked with Mr. McClanahan about it. He asked me to come and testify to-day.

Q. Is that all he said about it? **[306]**

A. Yes. He asked me to come in court and

(Testimony of William Pololu.)

asked me if I know these things down there, if I was working there, and I said yes.

Q. What else? A. That is all.

Q. Didn't he ask you about how the wire was fastened?

A. Yes, that is all the things he asked me about the buoy and the chain, that is all he asked me.

Q. Give us the whole conversation between you and Mr. McClanahan, everything that you said and everything that he said.

Mr. McCLANAHAN.—Object to any such question as that with an ignorant Hawaiian.

Mr. FRANK.—Q. When you first came up there what did he say to you? First, what did Mr. McClanahan say? A. When, this morning?

Q. When you say you talked to him, this morning or yesterday or whenever it was.

A. This morning a little while ago, and yesterday that fellow came up to me and said Mr. McClanahan wants to see you. I never go there. I left my work and went down there half past eight.

Q. What was the first he said to you when you went down there?

A. He asked me about cable wire and chain.

Q. What did he say?

A. I said I know them, he said come up here about half-past 10 to court. That is all he said.

Q. Was that all? A. Yes.

Q. Didn't he show you this wire?

A. Well, I know the wire on the table down there, I saw the wire down there.

(Testimony of William Pololu.)

Q. Didn't he show you the wire, didn't he have you take a wire and make a loop as you have done in court? A. No. [307]

Q. Did he ask you if it was made with a loop as you have done in court?

A. Yes, he asked me and I showed him how it was made.

Q. You showed him?

A. Yes, I showed him but he didn't show me because I know it. I showed him.

Q. Now, I understand you, there was an eye made on the end of the wire, is that right?

Mr. McCLANAHAN.—I would like to have the Court ask the witness if he understand what "eye" means.

(The Court interprets this.)

A. The loop was around the cable and fastened with a shackle.

Mr. FRANK.—Q. I am not getting just what I want. We will take this that Mr. McClanahan showed you. I understand that this is what we call an "eye." This end inside this clamp, you understand (showing on small piece of wire used by Mr. McClanahan on direct examination).

A. Yes.

Q. This eye—you found an eye like that on the end of the rope? A. On the chain.

Q. On the wire cable?

A. No, this way on the end (showing).

Q. I am not asking you on the chain. Was there an eye like this on the end of the wire cable?

(Testimony of William Pololu.)

A. Yes.

Q. How many clamps were there on it?

A. Two clamps.

Q. How big was this in here between the clamps and the end of [308] the wire?

A. About one foot.

Q. About one foot which way?

A. From this end?

Q. From the end of the clamp?

A. Yes, from the end the cable went to down here; I think this is round.

Q. Then, as I understand you, from the end of the cable where it was beyond the second clamp when it was bent around on to the chain to the place where it was fastened on the cable by the shackle at the other place, you say, is about one foot?

A. Yes, about one foot or more.

Q. About how much more?

A. One foot or more.

Q. That is all? A. Yes.

Q. Now, what I want to get at is how big was this hole made by the shackle here, containing the two pieces of wire made by the clamp holding down the two pieces of wire?

The COURT.—How long was that eye?

A. How wide was the hole?

The COURT.—Yes.

A. I think it is more wide. (The witness takes the wire held by counsel and curves it into a loop and says it is "more wide than that loop.")

Mr. FRANK.—Q. I don't mean the big hole that was around the chain. I mean the hole that was

(Testimony of William Pololu.)

made by the clamps. You say there were two clamps? A. Yes.

Q. Now, here is a hole at the end here, is that right? A. Yes, a hole. **[309]**

Q. How big was that hole?

A. I couldn't tell you how big because I didn't measure how wide.

Q. You saw it?

A. Yes, but I didn't measure how wide.

Q. Well, have you any idea at all whether it was one foot, two feet, three feet, or four feet?

A. No.

Q. No what? A. I can't tell.

Q. You can't tell whether it was one foot, two feet, three feet or four feet?

A. I couldn't tell.

Q. Now, how big, then, was the other hole which you say was around the chain. Can you tell that?

A. No, I know close to the chain, but I don't know how big.

Q. Do you know whether that was 1, 2, 3, 4, 5, or 10 feet? A. No.

Q. You couldn't say? A. I couldn't say.

Q. You know what a foot is, don't you?

A. Yes, I know.

Q. Now, when this thing was around the chain, do I understand you to say that one or two of the clamps that were on the end of the chain was pulled through this shackle?

A. Yes, two clamps together in the shackle.

Q. By that you mean, do you, that this end

(Testimony of William Pololu.)

around—now, when you say that one of the clamps had gone through the shackle, do you mean that that was turned around so (showing) that this shackle was here, and one clamp on this side and one clamp on that side like that? **[310]**

A. No, both through here (showing).

Q. This end, one on this end, but the other clamp was over here too, was that right?

A. Yes, but not close.

Q. Now, let us see whether we can both understand this. (Mr. Frank draws diagram and shows the same to the witness.) Do you know the alphabet, A, B, C, D? A. Yes.

Q. You know that? A. Yes.

Q. Now, where I make "A" over here, this is supposed to be the shackle; small "b" and small "c" are the two clamps. Do you understand that these are the two clamps? A. Yes.

Q. You say were on the wire, and this is the shackle? A. Yes.

Q. And this is the loop, the eye, is that the way you found it, with a shackle running from the eye inside of these two clamps,—"b" and "c"?

A. Yes.

Q. That is the way? A. Yes.

Mr. FRANK.—I offer this in evidence and ask that it be marked as an Exhibit.

(The diagram referred to was received in evidence and marked Libellee's Exhibit "L.")

Q. Now, did I understand you to say that these two little clamps had been pulled through that big

shackle, that these clamps had been pulled through there. (Showing with wire above referred to.) They had been pulled through the big one?

A. I don't know exactly whether pulled through. I see the two clamps behind. I don't know whether pulled or whether they put the shackle in front, and that is the way the clamps were behind. **[311]**

Q. Now, how close was the big shackle that you say was on the inside of these two clamps, how close was that up to the chain? A. That shackle?

Q. Yes. A. To the chain?

Q. Yes.

A. I think it was about five inches or six inches.

Q. Five or six inches? A. Yes.

Q. You know what five or six inches is, don't you?

A. Yes, I know.

Q. About that far? (Showing on foot-rule six inches.) A. Yes.

Q. Did you notice how big the buoy was that you took up?

A. Well, I know the buoy is more bigger, but I couldn't tell you how wide or how high.

Q. Well, as the buoy lay on the water would it be five or six feet from one end of it to the other, you have thrown your hands out this way across your body (showing), do you mean five or six feet from one end of the buoy to the other?

A. I don't know; I couldn't tell.

Q. It would be wider than you could reach by throwing your two arms out straight from the shoulders.

(Testimony of William Pololu.)

A. Yes, I think this side over here, near the Myrtle Boathouse.

Q. I am talking about this buoy that had a chain on it. Now, how big was that buoy? Measure it by something that you can see in the room here.

A. Like this big, I think. (The witness is referring to the witness-stand in which he is standing.) That is what I think.

Q. When you say that it is as big around as the witness-stand, was it like a stove-pipe?

A. No. **[312]**

Q. I show you a diagram and ask you does that show the shape of that buoy?

A. No, it is a round buoy.

Q. How was it round?

A. Round, but on top small; it goes this way (showing).

Q. Is that the way that the buoy looked? (Showing drawing.)

A. Yes, but that is too long.

Q. But that is the shape? A. Yes.

Q. And about how big around,—as big as this witness chair? A. Yes.

Mr. FRANK.—We offer this in evidence and ask that it be marked as an Exhibit.

(The diagram was received in evidence and marked Libellee's Exhibit "M.")

Mr. FRANK.—Q. Were these two clamps (showing clamps as marked on Libellee's Exhibit "L"), small "b" and small "c" on Libellee's Exhibit "L," were they right close up to the shackle "A"?

(Testimony of William Pololu.)

A. This second one?

Q. Yes, "b."

A. Well, not too close with the shackle.

Q. Not too close; how far was it from the shackle?

A. I couldn't tell you, I don't know how wide; I don't know how many inches or how many feet; I couldn't tell you.

Q. Well, put your hands up and show us how it looked to you.

A. I think this way. (The witness showing the distance with his hands.)

Q. Just hold your hands there a moment. (Measures distance between the witness' hands with ruler.) About one foot and ¾. **[313]**

A. I don't know.

Q. Well, that is about the size. Then I understand you that the clamp "b" was the distance you have shown with your hands from the shackle "A"?

A. That is what I think; I couldn't prove it because I didn't measure.

Q. But that is the way it looked to you?

A. Yes, that is the way it looked.

Mr. FRANK.—That's all.

Mr. McCLANAHAN.—That's all. **[314]**

[Testimony of Mariano Faria, for Libelant.]

MARIANO FARIA, called as a witness on behalf of libellant, being duly sworn, testified as follows:

Direct Examination.

Mr. McCLANAHAN.—Q. What is your name?

A. Mariano Faria.

Q. Where do you live?

(Testimony of Mariano Faria.)

A. Above the Mormon Church, on Punchbowl.

Q. How old are you? A. 26.

Q. How long have you lived in Honolulu?

A. Well, about ten years, I think; I came from my country; we went up to Pahala, I was raised there, about ten years in Honolulu.

Q. What are you doing, what is your business?

A. Working on the wharves?

Q. How long have you worked on the wharves?

A. About nine years.

Q. Who are you working for? A. Morse.

Q. Who is Morse?

A. Fellow takes care of wharves.

Q. Who does he work for?

A. For Public Works.

Q. Public Works of the Territory? How long have you worked for the Territory?

A. About nine years.

Q. Who are you working for now?

A. The same, the Public Works.

Q. Do you remember the time that the "Siberia" fouled a wire in the harbor?

A. The time she was afouled, no, sir; I don't remember; I never remember when she was afoul; that night when she got the propeller tangled up with the wire, I don't remember that. **[315]**

Q. You remember the fact, don't you?

A. Yes, sir.

Q. Did you have anything to do with the buoy in front of the lighthouse at or about that time?

A. Yes, sir.

(Testimony of Mariano Faria.)

Q. Did you go to the buoy? A Yes, sir.

Q. How did you go?

A. On the pile-driver.

Q. What did you do to the buoy when you got there with the pile-driver?

A. We went there and Willie Pololu dived down, and he tied a rope about four feet away from the cable wire and we pulled up the chain and when we got about 20 feet above the water; then we took the cable and took the wire rope and laid that on the scow on the pile-driver.

Q. Were there any white men on the pile-driver?

A. Yes, sir.

Q. Who were they, do you know?

A. No, sir; there was two white men, I don't know, they came on a steam launch.

Q. Did they have anything to do with the wire?

A. Yes, sir; they wanted to examine the wire and the chain that was close by.

Q. How do you remember that they examined the chain?

A. Well, because Morse told me that Hackfeld was going to have a lawsuit against the "Pacific" dredger.

Q. When did he tell you that?

A. Well, he told me at the beginning and four months ago he told me the same thing.

Q. What do you mean by the beginning?

A. The first day when we went out. **[316]**

Q. Do you remember how that cable was fastened to the chain? A. Yes, sir.

(Testimony of Mariano Faria.)

Q. Will you take this piece of string and show the Court how it was fastened to the chain?

A. They had two small little clamps, one by the end and about a little over a foot, they had two clamps, you know, and then they had an eye and then on the end of that chain they had a big shackle and then the wire was there like that, and was on the shackle (showing with string).

Q. Will you use this post here (indicating post of witness-box) as the anchor chain and show how it was fastened around?

A. All right. (The witness does so.)

Q. I will hand you a small shackle which you may use and show how that was fastened around the anchor chain.

A. It is pretty hard to make it over there.

Q. You say there is an eye there?

A. Yes, sir.

Q. Well, make your eye then.

A. They had a small little thing like that, that is the eye, and they had a clamp here and another clamp further back and then they had this loop and the big shackle, that is the wire here, and then they took the chain and they put him in here, and this pin goes right through about two inches and a small pin coming right through a little hole, and then, of course, the rope was tied against the big shackle.

Q. Here is your shackle? A. Yes, sir.

Q. Now, make your eye on the end of the rope.

The COURT.—Give him one of the cables to act as an anchor chain.

(Testimony of Mariano Faria.)

Mr. McClanahan gives witness cable and wire.

Q. (Indicating cable.) Now, this is the anchor chain? [317] A. Yes.

Q. Now, will you put this as it was around here?

A. It had a big loop.

Q. Well, I know it; we are not talking about the size of the loop; just put it around the way it is fastened. A. (The witness does so.)

Mr. McCLANAHAN.—The witness had taken the eye in the wire, put the shackle through the eye and then passed the eye over the main line.

Cross-examination.

Mr. FRANK.—Q. Mariano, what did Morse have to say to you about this?

A. I never talked to him, only what he said; he told me Hackfeld was going to have a lawsuit against the Pacific dredger.

Q. When did he tell you that first?

A. The first time when I went out.

Q. What business had he, what was he doing?

A. He was the boss in the shop.

Q. After that did he speak to you about it again?

A. Yes, sir.

Q. When?

A. About four or five months ago.

Q. What did he say to you then?

A. He told me the same thing, that Hackfeld and Company was going to have a lawsuit against the "Pacific" dredger.

Q. Did he say anything to you about this wire rope, or fastening on the buoy? A. No, sir.

(Testimony of Mariano Faria.)

Q. You are sure he didn't say anything to you about it? A. No, sir. **[318]**

Q. When did he speak to you again about it?

A. About four months ago.

Q. That is the last time? A. Nobody.

Q. Nobody at all? A. No, sir.

Q. You are sure of that? A. Yes, sir.

Q. Didn't you speak to Mr. McClanahan about it?

A. No, sir. Mr. McClanahan called me up to the office and he explained and he told me how it was.

Q. He told you this thing was fastened around the chain in the way you have explained

A. No, sir. He told me to come and tell the truth.

Q. Is that all?

A. Well, if I knew the regular thing to come up and tell the truth.

Q. Regular thing about what?

A. About that chain and cable wire.

Q. What do you mean by the regular thing?

A. If I had seen it.

Q. Have you seen it? A. Yes, sir.

Q. Did he ask you how it was made fast?

A. Yes, sir.

Q. What did you tell him?

A. I told him I know.

Q. Did you show him how? A. No, sir.

Q. Did you tell him how? A. No, sir.

Q. Only said yes, you knew? A. Yes, sir.

Q. Is that all you said to him? A. Yes, sir.

Q. All you said to him? A. Yes, sir.

Q. Didn't tell how it was made fast?

(Testimony of Mariano Faria.)

A. No, sir. **[319]**

Q. No other conversation? A. No, sir.

Q. You are sure? A. Yes, sir.

Q. And you talked to nobody at all about how it was made fast until you came on the stand here?

A. Yes. I got Polulu up to his office, because I never told nothing that happened because he knew it himself.

Q. You didn't talk it over with Pololu either?

A. Yes, sir.

Q. This is the first time in your life that you have explained to anybody how that is made fast?

A. Yes, sir.

Q. Now, how far, Mariano, was this big shackle on the chain when it came on the dredge?

A. How far up?

Q. No, how far away from the chain was it made fast? A. From the wire to the chain?

Q. From the big shackle to the chain.

A. The big shackle was fast to the chain.

Q. Fast to the chain? A. Yes, sir.

Q. Now, let's take this thing again (showing wire with loops and shackles). I thought you illustrated it that way, the first illustration that you made, but when you came to put it on here you put it on different; just take this string and hold it up, and that is the chain (showing). Now, when you say this was fastened on the chain, is that what you mean?

A. No, sir.

Q. Well, what is that you mean when you say it was fast on the chain? **[320]**

(Testimony of Mariano Faria.)

A. The chain had a bigger ring, an iron ring, and they put the big shackle to that ring.

Q. To the ring from the chain?

A. Yes, sir.

Q. Now, if this is the chain—now, we will make a knot in it so as to make it look like a ring on the chain—now, you mean that there was a ring fastened in the chain like that; is that right?

A. Bigger than that.

Q. But a ring it is that was part of the chain?

A. Yes, sir.

Q. And then that shackle?—

A. They put this right through like that (showing).

Q. Now, as I understand you, now this wire cable wasn't around the chain itself, but the end through a ring that was on the chain?

A. Yes, on the chain from the anchor.

Q. Where from the anchor?

A. From the buoy.

Q. Where was that ring, at the head of the anchor?

A. No, sir, on the head of the chain.

Q. Which end do you mean where the chain passes here?

A. The chain running out and the anchor further back, the wire on the end of the chain.

Q. Now, let's see whether I understand you. This buoy, if I understand you aright, was fastened on a chain that didn't drop down in the water but ran away back in the reef along the surface, on the

(Testimony of Mariano Faria.)

top? A. Yes, sir.

Q. It wasn't in deep water at all?

A. No, sir.

Q. And this chain that ran back had a ring on it? [321] A. Yes, sir.

Q. And on to that ring this cable was made fast?

A. Yes, sir.

Q. So that really it wasn't fast to the buoy at all?

A. No, sir.

Q. But it was on to the chain, pulling on the chain, that ring, back to an anchor or something away back on the reef?

A. Yes, sir. The government anchor to hold the ships.

Q. And the water where this ran through was about how deep?

A. Well, about 4 or 5 feet deep.

Q. No deeper? A. No, sir.

Q. But it was as deep at that, at least 4 or 5 feet?

A. Yes, sir, because on the end of the chain they got a buoy, a small stick, with a small stick so, you come and lift the chain up and make fast a rope.

Q. On the end of the chain a buoy?

A. No, a ring, a big ring.

Q. Now, did you notice when it came up whether or not these two little shackles were on the inside or the outside of this shackle?

A. It was on the outside of the shackle; the shackle was inside.

Q. How far was the shackle from the ring?

A. The shackle was close by to the ring, it was

(Testimony of Mariano Faria.)

jammed in.

Q. And the whole thing bent over?

A. Yes, sir.

Q. When you say close by the ring, give us the distance.

A. Well, I should say about a foot.

Q. How big was the eye of the wire in which the shackle was put?

A. Well, about three feet, a little less than 3 feet.

Q. Three feet from the innermost small shackle to the end of the eye? A. Yes, sir. **[322]**

Q. And then, as I understand you, between the two clamps, the innermost small clamp—between the two clamps was how far, there were two clamps on that eye, what was the distance between the two?

A. Well, about 12 inches, about 8 inches the two clamps were apart.

Q. About how far? A. About 2 feet.

Q. About two feet? A. Yes, sir.

Q. So that from where the furthest clamp was to the length of the eye, the eye itself was about three feet, and about 2 feet between the two clamps, then the outer clamp was about 5 feet from the eye?

A. Yes, sir.

Q. The rope was bent around it?

A. Yes, sir, doubled.

Q. Two pieces of rope ran around to make that eye between these clamps? A. Yes, sir.

Q. I understand you that this ring to which this wire was attached was part of the chain itself?

A. Yes, sir.

(Testimony of Mariano Faria.)

Q. And the wire wasn't around the chain at all, but it was only through this ring?

A. They made it fast to the ring on the chain.

Q. Do I understand you aright that the wire was made fast to the chain by coming through the ring?

A. No, the end in the ring, into the ring, and that is all.

Q. That is all? A. Yes, sir. **[323]**

Q. It didn't go around the chain but was made fast by going into the ring? A. Yes, sir.

Q. And that is all? A. Yes, sir

Q. Now, we will see if we can draw this so we don't make any mistake about it, about the description of it, and see whether we understand each other. By the way, before we go into that what kind of a buoy was that? A. No buoy at all.

Q. Didn't you draw a buoy up on the pile-driver?

A. No, sir. We lifted up the anchor. I mean the chain and that cable wire.

Q. You didn't raise the buoy at all?

A. No, sir.

Q. Is that chain fastened to any buoy?

A. To anchors.

Q. Wasn't the chain fastened to a buoy?

A. No, sir.

Q. There was no buoy at all?

A. No, sir.

Q. And you didn't raise up any buoy on the pile-driver—all you did was to raise a chain and there was no buoy attached to it? A. No, sir.

Q. Now, of course you understand the alphabet

(Testimony of Mariano Faria.)

all right, don't you? A. Yes, sir.

Q. (Showing the witness diagram.) Now, we will make "A" on this diagram as the big shackle, small "b" and small "c" as the clamps, and big "D" as the chain and "E" as the anchor, a line here, that is, the straight line underneath it is supposed to be the bottom of the sea. Now, does that indicate properly the way in which that was made fast?

A. Yes, sir, but this rope goes through the ring, the wire rope goes through the ring and then make it fast. **[324]**

Q. Instead of this turn here (showing) it went right through like that and there is the loop?

A. Yes, sir.

Q. Now, is that right (showing corrected diagram). A. Yes, sir.

Q. That is the way, is it? A. Yes, sir.

The COURT.—(Pointing to diagram.) And that is the end of the chain, no more chain?

A. Yes, sir, no more chain.

Mr. FRANK.—No more chain and no buoy.

A. No buoy, no, sir.

Mr. FRANK.—I offer this in evidence and ask that it be marked as an exhibit.

(The diagram was received in evidence and marked Libellant's Exhibit "N.")

Redirect Examination.

(Mr. McCLANAHAN.)

Q. You saw me first to-day, did you not?

A. Yes, sir.

Q. Didn't you see me yesterday?

(Testimony of Captain Johnson.)

A. Yes, sir.

(At this point a recess was taken, and the hearing of the above-entitled cause was continued until 2 P. M.) **[325]**

AFTERNOON SESSION.

March 22, 1907.

[Testimony of Captain Johnson, for Libelant (in Rebuttal).]

Captain JOHNSON, called as a witness on behalf of libellant in rebuttal, being duly sworn, testified as follows:

Direct Examination.

(Mr. McCLANAHAN.)

Q. What is your name, Captain?

A. George H. Johnson.

Q. How old are you?

A. 50, last September.

Q. What is your business?

A. Captain, sea captain.

Q. Master of what ship?

A. Schooner "Mary E. Foster."

Q. The "Mary E. Foster" made this port yesterday afternoon? A. Yes, sir.

Q. Do you remember the fouling of the "Siberia's" propeller by a buoy? A. Yes, sir.

Q. Where were you at the time?

A. I was moored out to the reef at that time.

Q. On what ship?

A. On the same one, "Mary E. Foster."

Q. What were you doing at the time?

(Testimony of Captain Johnson.)

A. I was fumigating the ship.

Q. With reference to the maneuver of the "Siberia," what were you doing?

Judge STANLEY.—Object to that as incompetent, irrelevant and immaterial and not rebuttal. It is going into the libellant's case in chief.

The COURT.—Will you state what you intend to rebut.

Mr. McCLANAHAN.—We intend to prove by the captain that there was an officer on the stern of the "Siberia," on watch at the time.

Mr. FRANK.—Same objection as to the former testimony offered **[326]** on this line.

The COURT.—Overrule the objection.

Mr. FRANK.—Exception.

A. I was aft at my poop deck watching the proceedings. I saw when she started from the wharf.

Q. What happened while you watched the maneuver of the ship?

A. Well, she backed out of the wharf to the "Mokulii" and picked up a wire off No. 2 buoy there. The buoy was heading I should say, I should judge about 40 feet, 30 or 40 feet inside of the bow of the "Mokulii," consequently I don't suppose it could be seen from the "Siberia."

Mr. FRANK.—Object to the argument of the witness.

Judge STANLEY.—Move that the supposition that the buoy couldn't be seen from the "Siberia" be stricken out as incompetent, irrelevant and immaterial; the whole testimony in regard to the buoy

(Testimony of Captain Johnson.)
is not what counsel offered to prove and not rebuttal.

Mr. McCLANAHAN.—I will consent to have the whole answer go out if that will please counsel.

The COURT.—Strike it out.

Mr. McCLANAHAN.—Withdraw the question.

Q. Was there or was there not an officer on the stern of the "Siberia" at the time? While she was making the maneuver. A. There was.

Q. How do you know?

A. By his uniform.

Q. Did you or did you not communicate with or attempt to communicate with him? A. I did.

Q. In what way? A. By my megaphone.

Q. How far was he from where you stood on your ship when you attempted to communicate with him? **[327]**

A. I should judge about 200 feet.

The COURT.—Q. From you?

A. From me, yes, sir, maybe more maybe less, but thereabouts.

Mr. McCLANAHAN.—Q. Please avoid, Captain, giving any conversation that you may or may not have had, but just state now what you saw this officer on the stern of the "Siberia" doing at the time you communicated or attempted to communicate with him.

A. First, he looked up to all sides of the ship and finally he stepped over the rail, one foot over the rail, and leaned over to see what was underneath. I pointed at the buoy winding up at his propeller and he knew, I suppose, something was wrong, and I

(Testimony of Captain Johnson.)

pointed to his propeller and at the same time shouted to him.

Q. You say there was a buoy which you pointed to under his stern? A. Yes, sir.

Q. Had you seen that buoy before you pointed to the officer? A. Yes, sir.

Q. Where was it?

A. Well, as I say about 40 or 50 feet on the side of the "Mokulii."

Q. How far from the bow of the "Mokulii" was the stern or the starboard quarter of the "Siberia?"

A. It may have been 50 feet, maybe a little more; I couldn't say exactly.

Q. How did the buoy reach the stern, the propeller—I want you now to tell what you saw in answer to the question.

A. Well, by some wire or something on the bottom of the ship, a lot of line went up in his propeller.

Q. You didn't see that?

A. Didn't see it, no, sir.

Q. What did you see? **[328]**

A. I saw the buoy going towards the ship and at the same time I knew there was something on the bottom that went up in his propeller.

Q. Did you see the buoy when it first started to move towards the ship? A. Yes, sir.

Q. Did she move fast or slow towards the stern of the ship?

A. Slow at first and then rapidly.

Q. After the buoy had reached the stern of the ship what happened, what did you see the buoy do?

(Testimony of Captain Johnson.)

A. It went up and down.

Q. Up and down where?

A. It went underneath the water and then came up and bounded against the counter of the ship. Went up four or five or six times striking the counter of the ship.

Cross-examination.

Mr. FRANK.—Q. Captain, where was that man which you say was an officer when you first caught sight of him?

A. He was on the starboard side aft.

Q. On the starboard side aft?

A. Yes, sir.

Q. How far aft?

A. 25 or 30 feet from the stern.

Q. On what deck?

A. On the hurricane deck or whatever you call it, on the top deck there.

Q. On the top deck? A. Yes.

Q. In what part of the ship? A. Aft.

Q. Well, I know, but in what part of the ship athwartships?

A. Out towards the rail, against the rail.

Q. On the starboard rail? **[329]**

A. Yes, sir.

Q. When did you first notice him?

A. I saw him there when the steamer was backing out he was right astern then.

Q. When the steamer was first backing out?

A. No, when she had got about half way out, I should judge, maybe I saw him just as she started

(Testimony of Captain Johnson.)

out; I am not sure.

Q. As a matter of fact, you weren't paying particular attention and you don't know when you did first see him?

A. I saw him when she was about halfway out standing up aft there right over the stern.

Q. Did you see what he was doing?

A. I suppose looking out for—

Q. I don't care what you suppose, but what you saw.

A. Just as I say, looking over the stern, looking after to see what was going on, I suppose.

Q. When he was on the starboard rail what was he doing?

A. Looking over to see what I pointed at.

Q. Then he wasn't at the starboard rail until you called his attention to something under the stern?

A. No, sir, not till then, he didn't go over to the rail.

Q. At that time how far was the "Siberia" from you? A. From where I was standing?

Q. Yes, sir.

A. I should judge about 200 feet, might be less.

Q. Which way was she going, sternways or forward.

A. Backing on the starboard propeller and going ahead on the port propeller.

Q. How was she making way on the water, forward or sternways?

A. Just about on a standstill when they picked up the buoy, just [330] hanging there, may have

(Testimony of Captain Johnson.)
moved slightly astern or slightly ahead a few feet.

Q. You don't know whether she was making sternway or headway or standing still as a matter of fact? A. Just about on a standstill.

Q. Then he had passed the bow of the "Mokulii," had he? A. Yes, sir.

Q. How far had he passed the bow of the "Mokulii"?

A. I should judge 30 or 40 feet perhaps or not quite that much about 20 feet.

Q. About 20 feet?

A. About halfway between me and the "Mokulii," and I was 20 or 30 feet from the "Mokulii," maybe 40 feet; he was just about the center.

Q. And the vessel hadn't come up abreast of your bow at all? A. No, sir.

Q. Was that the position in which he was when you saw the buoy start?

A. Yes, sir; well, he wasn't turned around as much as he was when they had the buoy wound up. Say this is the wharf he backed out from (showing on side of witness-box). He goes at an angle like this and after he wound the buoy up he was going out about this way (showing).

Q. What I am getting at is this, at the time he had ceased making sternway and had got as far towards the "Mary E. Foster" as he ever got, that is when you saw the buoy start?

A. Oh, no, it was before that. As I explained she was backing out and then she stopped and when he got as far as he ever got then he had the buoy

(Testimony of Captain Johnson.)

right on his counter. [331]

Q. How far towards you across the bow of the "Mokulii" was he when you saw the buoy start?

A. From the bow?

Q. No. (To Reporter.) Read the question. (Reporter reads question.)

A. Just barely past the "Mokulii" when I saw the buoy start. I don't know as he was past; just about in line with the "Mokulii."

Q. From that time to this, Captain, have you ever spoken of this thing? A. No, sir.

Q. Never mentioned it to anybody?

A. No, sir, it wasn't any of my business.

Q. Never thought of it again?

A. Never thought of it until I was called on to-day to testify.

Q Just simply passed out of your mind on that day and from that time to this it never occurred to you again?

A. I have thought of it, but never had any conversation.

Q. When you say you have thought of it, just what do you mean—do you just mean to say that it occurred to you that the "Siberia" picked up a wire and that is all? A. That is all.

Q. And the details you have never thought of from that day to this, or never spoke about it, or mentioned it until you have spoken about it to-day on the stand? A. That is all I remember.

Q. After this man looked over, as you say, the starboard rail, how far towards the lighthouse did

(Testimony of Captain Johnson.)

the steamer go before she stopped?

A. Well, just about abreast of the lighthouse.

Q. About abreast of the lighthouse?

A. Yes, sir.

Q. How far was that from you?

A. A considerable distance; 300 or 400 feet.

[332]

Q. As I understand you, the "Mokulii" was lying about 40 or 50 feet from you?

A. Hardly 50 feet, may have been 40, I don't think more, I don't think that much; I stated from 20 to 40, 30 feet was more likely.

Q. The "Mokulii" was lying 30 feet from you?

A. Yes, sir.

Q. And the buoy at that time was lying how far from you?

A. The buoy was right up against the steamer.

Q. Before it started how far was it lying from the "Mary E. Foster"?

A. About the same distance, right hard up against the "Mokulii" so far as I could see, right alongside of her.

Q. Right hard up against the "Mokulii"?

A. I don't know as it was touching the side, but right alongside of her.

Q. The buoy was in the neighborhood of 30 feet from you?

A. 30 or 40 somewheres around there.

Q. You say you spoke to this officers through a megaphone?

A. Tried to, whether he heard me or not I can't say.

(Testimony of Captain Johnson.)

Q. You got no answer?

A. No, sir, even on the bridge they was looking over the water at me, both the pilot and the captain.

Q. Both the pilot and the captain?

A. At least I think it was; two men up there looking towards me.

Q. You don't know who this man was on the after bridge except that you saw a man there with a uniform on?

A. I saw an officer; I couldn't tell whether 1st, or 3d or 6th officer.

Q. Captain, you have a lawsuit against the dredger "Pacific," haven't you?

A. I believe so. **[333]**

Q. And Mr. McClanahan is conducting that suit for you against the dredger "Pacific," is he not?

A. I don't know.

Q. Why don't you know?

A. I haven't heard yet. Messrs. Allen and Robinson have got that in hand and they haven't told me yet who is the attorneys.

Q. But you are suing the dredger "Pacific" for an alleged collision; isn't that so?

A. Yes, sir.

Q. Now, let's see if I understand you rightly, Captain. This officer, whoever he was, you first saw on the extreme stern of the vessel, is that right?

A. Yes, sir, on the starboard quarter right over the stern—say there is the stern (showing on rail of witness-box).

Q. Now, you also testified that this buoy ap-

(Testimony of Captain Johnson.)

proached the vessel from the starboard quarter, didn't you? A. Yes, sir.

Q. Right in a direct line, right towards this man?

A. Yes, sir.

Q. And she must have travelled how far before she got to the vessel? A. Yes, sir.

Q. How far did the buoy travel before it got to the vessel? A. About 40 feet.

Q. About 40 feet? A. More or less.

Q. More or less is rather indefinite, how much more or how much less. Let us get it as near as you can, how much more or how much less than 40 feet?

A. About 40 feet.

Q. 40 feet that is the buoy travelled from the time you first **[334]** saw it start until it was under the counter about 40 feet?

A. I should say 40; yes.

Q. Did you notice how far towards the Honolulu wharves the "Siberia" travelled from the bow of the "Mokulii" when she first passed it going astern of it?

A. You mean the bow from the wharf?

Q. I want to know what the distance was between the bow of the "Mokulii" and the stern of the "Siberia" when she was going sternwards towards the "Mary E. Foster"?

A. Before she stopped you mean?

Q. Yes. A. I should say about 30 feet.

Q. About thirty feet?

A. Apparently that; distances like that is very deceiving; it may be more, maybe less.

Q. Now, see that we understand each other.

(Testimony of Captain Johnson.)

What I want to know is this. The "Siberia" was backing up the harbor towards the "Mary E. Foster," you understand that?

A. Towards the "Foster."

Q. In doing so she passed the bow of the "Mokulii"; what I am saying is this, when the "Siberia" left the wharf and came towards the "Mary E. Foster" she passed the bow of the "Mokulii"; is that right?

A. Well, she cleared, as I say, but about halfway.

Q. You mean halfway?

A. When she backed out from the wharf she lay just about in line with the "Mokulii's" bow and she couldn't come over my way until she started to turn.

Q. But she did come over your way?

A. Yes, about halfway between me and the "Mokulii." [335]

Q. When she made that movement how far off was she from the bow of the "Mokulii"?

A. As I said before, 40, and maybe more feet.

Q. No nearer? A. I don't think so.

Q. If anything, more? A. Yes.

Q. Now, at this time this officer, whoever he was, was looking over the stern of the ship, was he?

A. While she was backing out.

Q. Was he looking down into the water directly underneath the ship?

A. I don't know as he was looking right astern. Maybe looking down, maybe looking right astern for that matter.

(Testimony of Captain Johnson.)

Q. As a matter of fact, then you don't know which way he was looking.

A. Well, not particularly. I could say he was looking right at the stern of the vessel like they always do when a vessel is going ahead or astern.

Q. We want to know what you saw, not what they always do. Now, leaving out the question of what men usually do there, you didn't see what he was doing there, did you?

A. Not particularly, just standing there looking aft as I said before.

Q. Was he in that position all the time from the time you first saw him until the time you tried to attract his attention? A. Yes, sir.

Q. When was it then that he was 25 feet back from the stern of the vessel as you have said in a former part of your examination?

A. When I sung out about the buoy wound in his propeller. **[336]**

Q. Then he went back 20 or 30 feet?

A. Maybe 25 feet from the stern where he was aft, and put one foot over the rail like this (showing) and leaned over to see what was underneath.

Q. Between these two times had he changed his position at all?

A. He may have slightly. I don't suppose he was perfectly still.

Q. I don't care what you suppose I want to know what you saw. Did he go anywhere else on that deck? A. No, sir.

Q. He did not; the buoy, however, when it came

(Testimony of Captain Johnson.)

under there, came how far under the counter?

A. Right hard up against the ship's side.

Q. Right hard up against the ship's side about how many feet from her stern?

A. Just in a line with the propeller. I don't know how far the propeller goes from the stern boxes.

Q. Wouldn't the propeller be in a line with the stern box?

A. Not exactly; in the twin screw steamers I think they are forward of the stern box.

Q. Where was the buoy in reference to the stern boxes? A. Right in the propeller.

Q. But you don't know where the propeller is. Where was the buoy in reference to being near the stern boxes or otherwise?

A. Right under the counter.

Q. Then it wasn't right up against the side of the ship, was it?

A. Yes, sir, right under the counter of the ship. What I call the counter is the overhang of the stern.

Mr. FRANK.—I know what the counter is.

Redirect Examination.

(Mr. McCLANAHAN.)

Q. In your cross-examination, Captain, you testified that the [337] buoy travelled about 40 feet?

A. Yes.

Q. In going from where it stood first until it reached the counter of the "Siberia"; then you testified that the "Siberia" was probably 40 feet from the bow of the "Mokulii"?

(Testimony of Captain Johnson.)

A. That couldn't be; that was a mistake; it was about 40 feet off the "Mokulii" and the buoy was 30 or 40 feet in on the "Mokulii," consequently she must have gone 70 or 80 feet altogether.

Q. 70 or 80 feet altogether? A. Yes.

Recross-examination.

(Mr. FRANK.)

Q. Are you getting to that by a process of reasoning or by your memory of the distance? Are you trying to adjust it to what you think it should be, or do you remember it?

A. I remember the distance, of course, as I said before I don't bind myself to the exact number of feet.

Q. Then, the difference between 40 feet and 80 feet—in all of your testimony you wouldn't want to be bound in any nearer proportion than from 40 to 80 feet? A. That is right.

Q. When you say a thing is 40 feet, it may be twice that distance; is that right?

A. No; that's a rather large margin.

Q. It would be a large margin; yes. What was the distance in this case that the buoy travelled from the time you first saw it start until it was under the counter? A. I would consider it 80 feet.

Q. And how far was the "Siberia" from the bow of the "Mokulii" at [338] the time you saw the buoy start?

A. I should judge about 40 feet, the buoy was away in on the "Mokulii" about 40 feet, I should judge.

(Testimony of Captain Johnson.)

Q. Do you know how long the "Mokulii" is?

A. No, I don't.

Q. How long do you think she is?

A. I should judge about 70 or 80 feet, she is a small boat.

Mr. FRANK.—That's all.

Mr. McCLANAHAN.—That's all. **[339]**

[Testimony of Keawe, for Libelant (in Rebuttal).]

KEAWE, called as a witness for libellant, on rebuttal, having been duly sworn, testified as follows:

Direct Examination.

(Through an Interpreter.)

C. K. HOPKINS was sworn as Interpreter.

Mr. McCLANAHAN.—Q. What is your name?

A. Keawe.

Q. What is your age? A. Over forty.

Q. Where do you live?

A. My permanent residence is at Kakaako.

Q. In this city? A. Yes.

Q. What is your business?

A. Carpenter.

Q. What work are you engaged in now?

A. Carpenter.

Q. Have you ever been employed in Government work? A. Yes.

Q. Where? A. Down on the wharves.

Q. How long have you worked for the Government down on the wharves?

A. I think nearly twenty years.

Q. What department of the Government?

(Testimony of Keawe.)

A. Carpentering sometimes, and sometimes going on scows and going out to the buoys.

Q. Do you know the location of a buoy formerly in front of the lighthouse? A. Yes.

Q. Do you remember the accident to the "Siberia," the steamship "Siberia"? A. Yes.

Q. Did you go to buoy No. 1, in front of the lighthouse, at any time after the accident to the "Siberia"?

Judge STANLEY.—Objected to as incompetent, irrelevant and immaterial, and not rebuttal.

The COURT.—Objection overruled.

Mr. FRANK.—Exception.

A. Yes. **[340]**

Q. When was it after the accident?

A. It was a Saturday.

Q. How many days after the accident to the "Siberia"?

A. When I came on that morning I was informed of the accident to the "Siberia"; I don't think it was fully a day.

Q. Why did you go to this buoy?

A. Under instructions to go to the buoy and to bring it up.

Q. Instructions from whom?

A. Jim Morse.

Q. Who was Jim Morse?

A. He was our head man.

Q. What did you go to the buoy on?

A. On a scow.

Q. What kind of a buoy was this?

(Testimony of Keawe.)

A. It was an iron buoy.

Q. What shape?

A. It was long and circular, round.

Q. When you reached the buoy what did you do?

A. I pulled the buoy up.

Q. How did you pull it up?

A. I sent a man down to tie a rope to the chain that was on the buoy.

Q. And when the rope was tied to the chain, then what did you do?

A. The buoy was then pulled up.

Q. Pulled up by hand or by what?

A. With steam.

Q. How high did you lift the buoy out of the water?

A. I think it was four feet and over, because it was higher than the scow.

Q. Higher than the scow; did you find anything on the chain of the buoy? A. Yes.

Q. What was it? A. Wire.

Q. Was there anything on the wire?

A. Yes, I think they call it the shackle; that was fastened—that is it had run and fastened itself to the chain.

Q. Was there more than one shackle?

A. Only one.

Q. Was there anything else on the wire besides the one shackle? **[341]**

A. Yes.

Q. What?

A. Well, there were two iron clinches, in the rear or back of the shackle.

(Testimony of Keawe.)

Q. Anything like either of these things that I show you? (Showing libellant's Exhibit 8 and also a new clamp.)

A. Like this one here. (Indicating.)

Q. Which was it like, this or this? (Showing.)

A. Like this; this is the one similar. (Witness indicated Libellant's Exhibit 8.)

Q. It had the double base, and not the single base?

A. Yes.

Mr. McCLANAHAN.—We offer this in evidence as the shackle which he says it does not resemble, the single one.

Mr. FRANK.—The one which he says it does resemble is—

Mr. McCLANAHAN.—Libellant's Exhibit 8.

Mr. FRANK.—Object to the introduction of this other shackle as immaterial.

The COURT.—Sustain the objection.

Mr. McCLANAHAN.—Q. Did you see, Keawe, how the wire was fastened to the chain?

A. Yes.

Q. Did you see for what purpose the clamps, the small shackles, were used? A. Yes.

Q. Will you please take this string and show how the wire was attached to the chain?

A. (The witness illustrates with a string around the post of the witness-box.) It was in this manner, and there was a shackle here on this end (showing), and it was fastened to the other side. There was a shackle on this end, and then it wound around the wire. Wound around there like that. (Showing.)

(Testimony of Keawe.)

Q. Were the clamps nearer to the chain than the shackle? **[342]**

A. The wire was bent in this fashion (showing), and the clamps were here, one here and one there (showing).

Q. Forming an eye in the wire?

A. There was a shackle here and then this shackle went around that way, so that it ran up to the chain and slid up against the chain.

Q. And the clamps were away on the other side of the shackle, away from the chain? A. Yes.

Q. If you should take that wire off that chain without disturbing the fastening of the clamps, would you have to pass the clamps through the shackle in order to get it off?

A. Yes; that is to say that the clamps could go through the shackle because the shackle was large.

Q. Did you try to pull the clamps through the shackle?

A. Yes. I had drawn the clamps through the shackle, so that it was loose.

Q. Did you remove the wire from the buoy?

A. No.

Q. When you had drawn the clamps through the shackle, so that it was loose, what did you then do with the clamps, shackle and wire adjacent thereto?

A. Well, I pulled enough of the wire so as to be loose, and then it was placed on the scow.

Q. Did you put any other of the wire on the scow?

A. Yes.

(Testimony of Keawe.)

Q. How did you get that wire, this other wire, on the scow?

A. I sent a boy on a boat to go down and tie a rope to the wire, in order that it might be drawn in.

Q. Where was the wire?

A. The wire was laying out, it lay crosswise with the channel.

Q. Out into the channel?

A. No, crosswise with the channel; the channel runs this way and the wire that way. (Showing with his hands.)

Q. Did the wire run towards the lighthouse, generally, or towards the middle of the channel? **[343]**

A. It was in the middle of the channel.

Q. After you had sent the boy out to make fast to this wire, what did you do then?

A. I sent him then to fasten it on to the power, and then it was pulled in.

Q. How much wire did you pull in?

A. I think about twenty or more feet; no exact measurement was taken.

Q. When you pulled it in what did you do with it?

A. Well, it was left on the scow as it was.

Q. How long did it remain on the scow?

A. It wasn't very long.

Q. What did you do with it after you took it from the scow?

A. Well, after the wire was brought out to the scow there was some white people that came on board the scow.

Q. And what did they do?

(Testimony of Keawe.)

A. They had a look at it and then went ashore again.

Q. Who were these white people?

A. I know one by name, that is Alec Lyle; the other one I don't know by name.

Q. There were only two then? A. Yes, sir.

Q. Did any other white people besides these come to the scow at that time?

A. Afterwards there were some others that came.

Q. Who were they?

A. Captain Fuller was one, because I am acquainted with him; Mr. Holloway was another; there was another one, but I don't know him by name.

Q. Who was working on the scow that day, with the buoy?

A. Those that were working on the scow that day, with the buoy?

A. Those that were working with me on the scow were two Portuguese boys and four Hawaiian boys.

Q. Do you know their names?

A. Some I do, but there were a few there I didn't know by name, being strangers just sent there by the head man. **[344]**

Q. Who were those that you did know?

A. Mariana, Pololu, Sam Ai, Akona.

Q. Where is Sam Ai?

A. I don't know where; I don't see him.

Q. Where is Akona?

A. I don't know that, either.

Q. Did you have occasion to handle this wire that was around the anchor chain of the buoy?

(Testimony of Keawe.)

A. Yes.

Q. What was its size, how large was it?

A. I should judge it was about an inch; might have been a little over an inch.

Q. Do you know what kind of wire it was?

A. Yes.

Q. Do you know more than one kind of wire?

A. Yes.

Q. I hand you Libellant's Exhibits 9 and 10, and ask you if the wire was like either of these pieces in its make? A. It is like one of these.

Q. Which one?

A. I judge this one. (Indicating.)

Mr. McCLANAHAN.—This is Libellant's Exhibit 9. Q. Are you sure it wasn't like this? (Handing the witness Libellant's Exhibit 10.) Are you sure the wire was not made like that wire?

A. Yes, I know that.

Q. What is the difference between this wire and the wire that was like the wire that was on that anchor chain?

A. This wire here has a double twist, while the other had only one twist.

Q. What do you mean by twist?

A. Well, its looks altogether is different from this one; and that one has the looks of that wire that I saw.

Q. And by "that one" you mean Libellant's Exhibit 9? A. Yes, that is what it looked like.

Q. Why was it that you observed the make of that wire, the way it was twisted?

(Testimony of Keawe.)

A. There was talk there about the "Siberia" and the wire, and that [345] drew my attention to pay more particular attention to the wire.

Q. How was the pin of the shackle fastened?

A. The pin was put through and then there was a key that was put through this pin.

Q. Did you attempt to remove the key?

A. No; I didn't take it off, but I looked at it.

Q. Why did you pull some of that wire, with the clamps on, through the shackle, and make it loose, where before it had been tight around the chain?

A. It was my intention to take off the wire.

Q. Take it off the buoy?

A. Well, I wanted to unfasten it, so that it would slip over the buoy.

Q. Slack out the wire?

A. My idea was to loosen the wire, so that I could get it over the buoy.

Q. Did you take the wire off the buoy?

A. No.

Q. Why not?

A. After having pulled the wire onto the scow, Alec Lyle and the other man came there; then it was left as it was, and then they went ashore and then afterwards others came.

Q. Why didn't you finish your job of taking it off the buoy?

A. I heard Alec Lyle say that he wanted to have a look at these things, and therefore I left it as it was. I didn't take the wire off from the buoy.

Q. When did you next have occasion to go to that

(Testimony of Keawe.)

buoy, after that Saturday? A. Monday.

Q. The following Monday? A. Yes.

Q. What did you do then?

A. I brought the buoy ashore.

Q. Was there a wire around it when you went on Monday to the buoy?

A. No; it was taken off. **[346]**

Q. Do you know who took it off?

A. I don't know.

Q. I would like to have the witness make a diagram. (Hands pencil and paper to witness.) Make a diagram showing how that wire was around that chain, before you loosened it up and pulled the clamps through the shackle?

A. (The witness draws diagram.) Here is the diagram.

Q. What is this line here? (Showing.)

A. The clamp.

Q. One of the clamps?

A. Yes, one of the clamps. This is the other clamp. (Showing.)

Q. We will mark them "A" and "B," the two clamps; is that right? A. Yes, sir.

Q. I will put "clamp" under each of these. Now, where was the shackle?

A. This is where the shackle was. (Showing.)

Q. I will mark the shackle "C"; now, where is the anchor chain—I will mark under "C" the word "shackle." Where was the anchor chain?

A. (The witness indicates on the diagram.)

Q. I will mark that "D." Now, how was the

(Testimony of Keawe.)

wire fastened around the chain; in other words where, on this wire, was the shackle made fast around the chain?

A. This is the buoy and this is the chain. (Showing.)

Mr. McCLANAHAN.—The witness points and calls the buoy "E," and the chain the line running from "E" to "D." Q. Is that right?

A. Yes; and then the shackle was on the outside of the chain, and fastened here:

Mr. McCLANAHAN.—The witness when he says "here" points to the place marked "F," as the fastening. Q. I will ask you if the clamp "A," clamped the two wires together?

A. Yes, it put the two together.

Q. And I will ask you the same question in reference to the clamp "B"? **[347]**

A. Yes, that is right.

Mr. McCLANAHAN.—I offer this diagram in evidence.

(The diagram was received in evidence and marked "Libellant's Exhibit 12.")

Mr. McCLANAHAN.—Cross-examine.

Mr. FRANK.—We would prefer to commence our cross-examination after adjournment.

Mr. Derby stated that before adjournment he would like to argue on the proposition of admitting Mr. Young's evidence out of order, the Court having ruled that it was not rebuttal evidence, stating that it was in the discretion of the Court to allow this evidence to go in out of its regular order, it being de-

sired in order to rebut the very unfavorable presumption arising from Captain Miller's testimony.

The COURT.—I will hear the motion, and counsel will have a chance to reply to-morrow morning.

Mr. Derby here argues on behalf of said motion.

The COURT.—I will call your attention, Mr. Watson, to the case of Chadbourn vs. Franklin, 5 Gray, on this point.

(The Court here adjourned and the hearing of the above-entitled cause was continued until March 23d, at 10 o'clock A. M.) **[348]**

[Proceedings Had March 23, 1907.]

MORNING SESSION.

March 23, 1907.

At the termination of the testimony of the witness Mariano Faria yesterday, Mr. McClanahan, counsel for libellants, being disappointed in the evidence of said witness referred to it in expressions which the Court felt should not remain on the record, as being unparliamentary. This morning Mr. McClanahan apologized to the Court for such remarks and requested that the whole thing be expunged from the record. Mr. Frank, for the defense, objected to having such matter removed from the record. The Court allowed the request of Mr. McClanahan, and ordered that the whole matter be expunged from the record, to which Mr. Frank took an exception, and the Court refused to allow the exception.

Mr. FRANK.—Exception to this entire proceeding, and I will ask that the reporter be allowed to give me a transcript of the whole matter, even if it doesn't

go into the record, in order that I may preserve it for future use?

The COURT.—That is allowed.

Mr. Watson, on behalf of libellee, now took up argument before the Court in reply to Mr. Derby, as to whether or not counsel for libellants should be allowed to now introduce the evidence of Mr. Young, and after reply had been made by Mr. Derby the Court stated that it would allow the evidence to go in.

Mr. WATSON.—Exception.

Mr. FRANK.—Now, might we ask the Court to limit the extent of the examination, so that they will not bring this man in and go over a whole lot of subject matter, but only the particular subject matter for which they are permitted to call him, which I ask may be now defined.

The COURT.—I should like to have that done myself. I understand, Mr. McClanahan, that this witness is intended to rebut Captain Miller's statement that the "Mokulii" was moored by its stern moorings to a buoy with a wire? **[349]**

Mr. McCLANAHAN.—Connected with that, and also as corroborating this statement of Mr. Young's, which will properly show where those wires are.

KEAWE (Continued).

Cross-examination.

Mr. FRANK.—Q. Keawe, do you understand English?

Mr. McCLANAHAN.—Submit it is immaterial.

Mr. FRANK.—It is very material.

The COURT.—It may be material.

(Testimony of Keawe.)

Q. Do you understand English?

A. (Through interpreter.) No very well.

Q. Did you understand what I said to you just now?

A. (Through interpreter.) I don't know.

(The last question repeated to the witness in Hawaiian by interpreter.)

A. (Through interpreter.) I don't understand it well.

Q. Do you understand it well enough to know what I am saying to you now? Do you understand what I said to you just now? Answer in English; the interpreter won't interpret it to you. Do you understand what I am saying to you now?

A. (Through interpreter.) I don't understand English enough.

Mr. FRANK.—(To interpreter.) Just ask him now, in his own language, when he says he don't understand English enough, if he means he don't understand at all what I said to him, and, knowing that I talked to him, makes that reply.

A. (Through interpreter.) I could understand some, but I am not capable to thoroughly grasp the idea, but I could understand some.

Q. How much of what I said to you just now did you understand? (Question interpreted.)

A. (Through interpreter.) I understood a little what you say, but not all.

Mr. FRANK.—(To interpreter.) Now, I wish to put this in English, and don't interpret to him. (To Witness.) Q. Do you know what a wire [350]

(Testimony of Keawe.)

is? (To interpreter.) Mr. Interpreter, tell him to answer me if he understands.

A. (In Hawaiian through interpreter.) I am unable to express myself in English.

Mr. FRANK.—(To Interpreter.) Tell him to answer the question that I have asked him in his own language, so as to make a reply to what I asked him.

A. Yes, I know what wire is.

(The remainder of the testimony of this witness was through the Interpreter.)

Q. Do you know what a shackle is?

A. Yes.

Q. Who was it that was talking about the "Siberia" and the wire at the time you say in your direct examination that your attention was called to it?

A. Well, I understood them to say "Siberia" and "wire," but I did not catch on as to the rest of their conversation, but I had been informed before that time of the accident.

Q. So all the conversation that you have testified to that you heard about the "Siberia" and the wire, all that you understood was the two words "Siberia," "wire"? A. Those were the only words.

Q. The only words you understood?

A. They said a good deal, but I didn't understand them.

Q. What I mean is, the only thing that you understood of the whole conversation was the two words "Siberia" and "wire"?

A. That was all that I understood from the con-

(Testimony of Keawe.)

versation. Of course there was considerable conversation.

Q. Now, Keawe, you are a carpenter, I understand? A. Yes.

Q. And you have been engaged in that business all your life?

A. Carpentering sometimes, when I am able to get carpentering work, and other things sometimes.

Q. What other things have you engaged in?

A. Work in connection with the buoys; work in connection with steamers, such as working freight on board, and so on. **[351]**

Q. Now, all the work which you have done in connection with the steamers is that of carrying freight on board and carrying it off, is that right?

A. Yes. Such freight as comes out of vessels, of steamers, on to the wharf; we would take trucks and take it away and pile it up.

Q. Now, you have done no other work of any kind, with reference to steamers or vessels, have you?

A. No, there was nothing else that I done, excepting sometimes, probably, when they gave me a few other duties to perform.

Q. Of what nature?

The INTERPRETER.—The witness states that at times he was working on the repairing of the wharves, and sometimes in the buildings, and then he went on to say "some other minor things," and then I put the question to him "What were these minor things."

(Testimony of Keawe.)

Mr. FRANK.—All right.

Q. Now, what is the answer?

A. Well, they were minor things; that is, pertaining to the hoe, cultivating and so on.

Q. Now, in reference to the buoys, what was the work that you have done, leaving out this particular time when you say you picked up buoy #1, concerning which you have testified?

A. Sometimes we would pull the buoy up and pull, and draw the wire on.

Mr. McCLANAHAN. — (To Interpreter.) Q. Did he say "wire" or "chain"?

The INTERPRETER.—Wire.

Mr. FRANK.—Q. Just ask him to explain what he means by "drawing the wire on"?

A. That is drawing it on the scow, because I had been given instructions to get that buoy and chain and the anchor, and to bring it ashore.

Q. Now, when you are speaking about drawing the wire on, you are speaking about this particular time that you have been testifying to, are you?

A. At the time that the instructions were given me that we were to **[352]** pick—to draw the buoy up with the chain and anchor, but when I went to carry out those instructions I found that there was a wire caught.

Q. Now, Keawe, did you ever at any other time, before this one time, have occasion to take a wire off of a buoy, or to draw a wire on to a pontoon or dredge? A. No.

Q. I presume that in your whole experience you

(Testimony of Keawe.)
scarcely ever handled a wire cable before; is that right?

A. Yes; I have had something to do with wires but they were on shore.

Q. What have you had to do with wires on shore?

A. Well, sometimes we would dig into the ground and lay a post there, and wind around this post the wire, to which we would attach blocks, and so forth, so that we could haul something that we wanted to haul.

Q. Is that the only way that you ever had anything to do with wire cables?

A. Sometimes on the pile-driver.

Q. What do you mean by "sometimes on the pile-driver"?

A. That was, the chain which ran up was fastened on to a big hammer, that strikes the piles.

Q. What was your duty on the pile-driver?

A. Sort of a gang boss of the pile-driver.

Q. The wire that went on the pile-driver was in charge of the engineer, wasn't it?

A. Yes, he had a right and I also had a right, though I was superior to him.

Q. A right for what?

A. My duties were this: I would be standing at a certain position to look out for any breaks in the wire, and if there was any break in the wire it would be my duty to fix it, while the engineer was at [353] my command to lift or lower the hammer as I directed him.

Q. Do you know what a right lay wire is?

(Testimony of Keawe.)

A. Yes.

Q. What is it?

A. There was one kind of wire has one lay and that is different from another kind of wire which you could plainly see has a double lay, one going one way and the other going the other way.

Q. When did you first hear of a wire with a double lay?

A. At the time that the Government was working its scow.

Q. How long ago was that?

A. Oh, some years ago.

Q. What was the incident, was it used on the Government scows?

A. It was a wire used for the purpose of drawing or pulling. If you wanted to go to one side you used it. It was in connection with scooping up dirt.

Q. What do you mean by "if you wanted to go to one side you used it"?

A. Because there was in front of the scow a sort of a scoop, and to this scoop was attached this wire, which you would draw this scoop to one side or the other.

Q. Now, let's see if we can fix the time, or the scoop or dredger on which you saw that used?

Mr. McCLANAHAN.—Submit there is no question there.

The COURT.—That is not an intelligible question, the time or scoop or dredger.

Mr. FRANK.—Q. Can you fix the time when you saw that wire used on the scoop or dredger of which

(Testimony of Keawe.)

you spoke? A. Some years.

Q. You can't fix it any nearer than that, "some years"?

A. It may have been four or five years, perhaps more.

Q. Now, do you remember the name of the scoop or dredger on which it was used?

A. Well, there was no name, with the exception that the Hawaiians called it a harbor dredger.

Q. Were you working on this harbor dredger?

A. No. [354]

Q. How, then, did you come to see the wire on it?

A. Because at that time the Government owned this dredger or scow, and I was working for the Government, though on shore.

Q. What work were you doing for the Government at that time?

A. Carpentering work on the wharves.

Q. Did you have anything at all to do with the wire on the dredger?

A. Sometimes when they required a wire, say, for instance, when the wire on board was broken, they would come to the storehouse and would ask us to assist them in taking wire out.

Q. And that is the only way that you ever observed any wire that was wound both ways before?

A. Well, I was continuously seeing such wire, such kind of wire.

Q. Was that the only kind of wire that the Government was using on the dredgers at that time?

A. At that time that kind of wire was used, and

(Testimony of Keawe.)

also another kind of wire was used.

Q. What other kind?

A. That has only one lay. Not like the wire that was shown to me.

Q. After you had picked this buoy up by the dredger, concerning which you have testified, on the Saturday after the "Siberia" went out, did you talk to anybody at all about it, about the wire?

A. No.

Q. Did you talk to anybody about it from that time up to the time you went on the stand?

A. That is, pertaining to the wire?

Q. Yes, pertaining to the wire.

A. Yes; I talked with others pertaining to the wire.

Q. You talked to others. When did you talk to others?

A. Well, it was some time after the drawing up of that wire.

Q. Whom did you talk to?

A. Well, it was after this hauling up of the anchor and coming ashore that somebody—the general conversation that was going on among the natives on shore, and I joined in with them and in the [355] conversation.

Q. Well, what was the general conversation among the Natives?

A. Well, their conversation was in regard to wire that was in connection with the dredger, that it had twined itself, or got itself twisted around, and that is what they were talking about, and of course I

joined with them, and told them of the wire I had seen on the scow.

Q. Did you tell them then that the wire that you saw was right lay wire? A. No.

Q. You never thought of it then, did you?

A. No, I had not thought anything about that. I paid attention to the wire that was drawn on to the scow.

Q. But you never thought of the lay of the wire, after that, until you were put on the stand, is that right?

A. No. At the time the wire was drawn up on the scow of course I paid attention to it, had a look at it.

Q. Is that all the answer?

The INTERPRETER.—He went on to say it was not a wire, but a twist here and a twist there.

Q. From that time that you put it on the scow, to the time you came on the witness-stand, did you ever think of the lay of that wire, or speak to anybody about the lay of that wire? A. Yes.

Q. When, and with whom?

A. Yes, it was when I was sent for by my superior, Jim, and when he asked me if I remembered everything about having pulled up a buoy, and I asked him what that was.

Q. Now, when did you have that conversation with Jim?

A. I think it was a week or more ago.

Q. A week or more ago; now, is that the first time, from the time of the accident, that you ever

(Testimony of Keawe.)

thought of or spoke about the lay of that wire to anyone? [356]

A. Yes, that was the time I spoke to him in regard to the kind of wire.

Q. Now, give us the conversation, what Morse said to you and what you said to him, at that time?

A. He asked me if I remembered having drawn the buoy and the wire, if I remembered the circumstances, and I said "Yes."

Q. Well, what next?

A. Then, I asked him the question, what was the trouble in regard to the wire?

Q. And what did he say?

A. And his answer was that "You are required to go before Court."

Q. Is that all the conversation that there was between you? A. Yes.

Q. Didn't he say anything to you, or you say anything to him about the lay of the wire?

A. Well, he asked me a few things pertaining to it, but our conversation was not long, and he only reminded me to remember what I had seen at the time.

Q. Well, if the conversation was not long, can you tell me what it was he said to you and you said to him, about the lay of that wire?

A. He asked me if I remembered the kind of wire; I told him yes. Then he asked me what kind of a wire was it, and then I told him that it was a wire with one lay.

Q. What drew your attention to the question as

to whether it was a wire of one lay or a wire of two lays?

A. Well, he asked me, and told me that there were two kinds of wires, and I told him I was acquainted with wires, and knowing me to have worked for the Government, and that I paid particular attention to this wire that it was of one lay.

Q. When you went out to this buoy to pick it up, that, I understood you, was on the order of your boss, Jim Morse, was it? A. Yes. [357]

Q. And were you doing it then as part of the Government work? A. Yes.

Q. And you drew your pay from the Government every day, of course? A. Yes.

Q. And the time that you went out there, I understand you to say, was on Saturday?

A. It was a Saturday.

Q. What are you doing now, Keawe?

A. Carpentering.

Q. For whom? A. For the Government.

Q. At what place?

A. Up at Nuuanu, Nuuanu Valley.

Q. What Government work is going on up there?

A. On the dam—on the reservoir.

Mr. FRANK.—That is all.

Mr. McCLANAHAN.—That's all. [358]

[Testimony of John A. Young, for Libelants (Recalled).]

JOHN A. YOUNG, recalled for libellants, under a ruling of the Court, having already been sworn as a witness, testified as follows:

Direct Examination.

Mr. McCLANAHAN.—Q. I understand from your evidence that you said that you owned the "Mokulii" and moored her near buoy #2?

A. I did.

Q. Was the stern mooring line or lines made fast to the buoy? A. No, sir.

Q. Where was it made fast?

A. Made fast to a drag I had out off the starboard quarter, a drag of my own; it was an anchor of mine.

Q. Which quarter would be on the buoy side?

A. Port.

Q. Was that her mooring during the month of November, 1905, up to the time you sold her to Captain Miller? A. Yes, sir.

Q. And her only mooring?

A. Yes, sir.

Q. Where is this mooring line?

A. The drag is down in the bay. I have it anchored to a scow I built after I sold the "Mokulii."

Q. Where is the line itself, the wire part?

A. I only had a short piece of wire; that is down at the house.

Q. How long is the wire?

A. The end I had over is just a short end, be-

(Testimony of John A. Young.)
tween thirty and fifty feet, the bight of the wire.

Q. What did the mooring line for the remainder consist of? A. Chain.

Q. When did you take it to the house, the wire?

A. The wire?

Q. Yes.

A. The day I moved her over—on the 27th of November.

Q. What year? A. 1905.

Mr. McCLANAHAN.—Cross-examine.

Mr. FRANK.—No questions. **[359]**

[Testimony of J. A. Lyle, for Libelants (in Rebuttal).]

J. A. LYLE, called as a witness for libellants in rebuttal (having previously been sworn), testified as follows:

Direct Examination.

Mr. McCLANAHAN.—I want to call the Court's attention to the record on page 73, as follows:

Mr. FRANK.—Is it a correction you want to make in the record?

Mr. McCLANAHAN.—Yes. (Reading:) "Q. What was the value of the services you performed? Mr. Frank.—Objected to as immaterial. The Court.—Q. You have already stated that you reached the ship at 7 o'clock in the evening? A. Yes, sir, I think that's right about that time I got to the ship"; and on page 73:

"Mr. McCLANAHAN.—If counsel makes the admission that the value of the diver's services is im-

(Testimony of J. A. Lyle.)

material I will withdraw that question. Q. I will ask you what were you paid for that service? A. I was paid one thousand dollars."

The record is incomplete as to Mr. Frank's admission.

Mr. FRANK.—I didn't make any. That record speaks the truth, just as the record occurred.

Mr. McCLANAHAN.—I take issue right there, as to the value of Lyle's services. If counsel says he made no admission that the value was immaterial, at least I thought he did, and continued my examination thinking that the value of the services was waived by counsel.

Mr. FRANK.—I won't stand in the way of your putting that in.

Mr. McCLANAHAN.—Q. What was the reasonable value of the services performed by you on the "Siberia" on the night of November 10th, 1905, in taking the chain off the propeller?

A. The value of the services was worth $1,000.00.

Q. That is the reasonable value of the services?

A. Yes, that is the reasonable value of them.

Q. Mr. Lyle, do you remember a visit to the buoy in front of the lighthouse, which we call buoy #1, the next morning after the "Siberia" accident, while the pile-driver was out there? **[360]**

A. I do.

Q. When you got out there what was the situation of the buoy?

A. The buoy was hoisted up on the pile-driver,

(Testimony of J. A. Lyle.)

the buoy and the chain was up quite aways out of the water.

Q. Was there anything on the chain?

Mr. FRANK.—It is understood this is subject to the same objection we have made right along, the same ruling and the same exception.

The COURT.—Yes.

Q. What was on the chain?

A. Well, there was a wire on the chain; that is what I was taken out there for, to look at that wire.

Q. What size wire was it?

A. Well, it is the same size as I had seen on the "Siberia."

Q. What size was that?

A. About inch wire.

Q. Do you remember how that wire was fastened on the chain? A. Yes.

Q. Will you please illustrate to the Court with that string which you have in your hand, how it was done?

A. (Showing with string on post of witness-stand.) Say this is the chain, and this is the wire, the wire was around the chain like that, and there was a bight in one end of the wire with two clamps holding it together, and this other part was shackled together by a shackle.

Q. Were these two clamps nearer the chain, when you saw them, than they were to the shackle?

A. No; they were lying on the scow.

Q. Was the wire single or double where the shackle attached itself to the main wire?

(Testimony of J. A. Lyle.)

A. This was a single part of the wire running out (showing), and the shackle was shackled on to the single part.

Q. Where were the clamps?

A. The clamps were right on the bight here, holding this end here. (Showing.) **[361]**

Q. Was this wire loose or taut around the chain when you saw it?

A. It was laying loose; there was quite a bit of it on the scow.

Q. But the fastening was intact?

A. Yes; intact.

Q. It had been loosened up? A. No.

Q. It had been loosened up?

A. I don't know that. I saw it on the scow.

Q. I should like to have you, Mr. Lyle, take a piece of paper and sketch the fastening, if you can, of that wire to that chain? (Hands the witness pencil and paper.)

A. (The witness does so.) This is the way it was. (Showing sketch.)

Q. What is this letter here?

A. That is the shackle there, "C," shackle.

Q. "Clamps" stand for the clamps?

A. Yes, two clamps.

Q. And the round hole with arrow leading to it what is that?

A. That is supposed to be the chain; that is the chain up and down the pile-driver. The pile-driver is laying that way, and this is a shackle, the single part running through the shackle and coming back

(Testimony of J. A. Lyle.)

to a bight, and there were two clamps right here. (Showing on diagram.)

Q. Had any other wire belonging to the shackle been drawn on the pile-driver?

A. No. This was just a single part running from here. (Showing.) When I got there I hauled some of it in, and then stopped because there was a little buoy a little float, and it began to come home, and when that came I stopped, and then we sat down and waited until Holloway came.

Q. How much wire was on the pontoon?

A. We hauled, if I remember rightly, four or five feet of it on to the pontoon.

Q. I mean altogether, how much wire was there there?

A. Well, I don't think there was more than twenty feet of it altogether; **[362]** it is pretty hard to tell exactly.

Q. Did you make any examination of the shackle and clamps?

A. Yes, I looked at them pretty closely, because after looking at those that night on the "Siberia" I wanted to see if they were the same.

Q. What was the result of your examination?

A. They were exactly similar to what I found on the "Siberia" inside there.

Q. Was the iron in the shackle the same size as the iron in the shackle on the "Siberia"?

A. I think it was exactly the same.

Q. What size shackle would you say that was?

Mr. FRANK.—I don't see that this is rebuttal,

(Testimony of J. A. Lyle.)

the fact that the shackle or clamps were like what he saw on the "Siberia." If counsel knows what this is rebuttal of he might tell us, and save a little time?

Mr. McCLANAHAN.—It is most vital and important evidence in rebuttal of the evidence of Spencer and Matson. (Argues.)

Mr. FRANK.—He had no right to testify that this was the same kind of shackle in the first place, and I move it be stricken out as not being rebuttal or having anything to do with anything testified to on the defense.

Mr. McCLANAHAN.—It is the most important evidence we have offered in the case so far, the evidence which we now offer. (Argues.) I want to show by this witness that shackles are measured not by the distance here (showing on bend of shackle), but by the distance from the center of the pin to there (pointing). A shackle of the same stock measurement, say a six-inch shackle, one might be wide here (pointing) and one narrow, and yet both would be designated as six-inch shackles, and both have the same heft of iron in them. (Argues.)

Mr. FRANK.—We contend that there is nothing in the record which shows that the shackles on buoy #1 are not the same as on #2. **[363]**

Mr. McCLANAHAN.—I am going to take the stand that the means employed and the implements were identical.

Mr. WATSON.—If counsel makes a statement of what the evidence is we want it substantiated by the record.

(Testimony of J. A. Lyle.)

Mr. FRANK.—We submit it is not proper rebuttal, wholly immaterial and an attempt on the part of the libellants to bolster up or reform the testimony of this witness on his original examination, which he has no right to do at this time.

(Here followed argument by counsel on both sides.)

The COURT.—Overrule the objection.

Mr. FRANK.—Exception.

Mr. McCLANAHAN.—(To Reporter.) What is the question?

(The reporter reads the last question.)

The WITNESS.—(Referring to shackle held up by Mr. McClanahan, being Libellant's Exhibit 2.) I would call that a six-inch shackle, I think.

Q. What do you measure the size from?

Mr. FRANK.—Is it understood that the objection, ruling and exception runs to each and every question along this line?

The COURT.—It is so understood.

A. It measures from the center of this pin, inside here. (Pointing.)

Q. Do all six-inch shackles have the same breadth from this side of the shoulder inside to that side of the shoulder inside? (Pointing.)

A. No, they do not.

Q. Does the term "six-inch shackle" have anything to do with the diameter of the iron?

A. Oh, no; we can make a six-inch shackle of any size iron.

Q. Could you find shackles of the same diameter

(Testimony of J. A. Lyle.)

of iron, and the same size measurement from the center of the pin to the under side of the shoulder, varying in breadth between the shoulders?

A. Shackles are different sizes inside; some are round inside like [364] the letter "O."

Q. Shackles of the same size iron and same height of shoulder would have a different breadth?

A. Yes, sir.

Q. Will you please state the condition of those clamps that you found, were they old or new?

A. Those clamps that we went out and looked at looked like new clamps to us; they had tar on them, paint on them.

Q. Was the wire new or old?

A. It was what I would call new wire, practically new.

Q. How many clamps did you say there were, altogether? A. Two clamps and one shackle.

Q. Can you say what kind of wire it was?

A. The wire, when I was down on the "Siberia," I had no way of measuring it, but it was the same size as my diving hose; laying the hose alongside of the wire it looked just the same size, and when I went out there it was the same size as my diving hose.

Q. I mean with reference to the lay; do you know what lay it was at buoy #1?

A. No, I don't know. I am not familiar with that.

Q. Did you examine the wire?

A. Yes, I looked at the twist, but I couldn't tell what lay. I am not expert enough for that.

(Testimony of J. A. Lyle.)

Q. Do you know Keawe?

A. Yes, sir. He was there at that time.

Q. Is Keawe a man who is expert in telling the lay of wires?

Mr. FRANK.—Submit that whether he is expert or not is to be determined by the Court.

Mr. McCLANAHAN.—Withdraw the question.

Q. How long have you known Keawe?

A. He has been working around the water front for years.

Q. Do you know whether or not he has had occasion to handle and [365] know of wires?

Mr. FRANK.—Object to that, as Keawe himself has told us what he has done.

The COURT.—Sustain the objection.

Mr. McCLANAHAN.—Exception.

Q. Which way did the end of this wire run?

A. The single end?

Q. Yes.

A. It ran up towards the Myrtle boathouse, out that way. I would like to state that when I pulled on the wire there was a float on the water, and we seen that coming towards the ladder, and I suppose that was the end of the wire.

(At this point an adjournment was taken and the hearing of the above-entitled cause was continued until March 25th, at 10 o'clock A. M.) [366]

MORNING SESSION.

March 25, 1907.

J. A. LYLE (Continued).

Mr. McCLANAHAN.—I see from the transcript

(Testimony of J. A. Lyle.)

of Mr. Lyle's evidence that the diagram which he made was not offered in evidence and I desire now to offer it in evidence.

Mr. FRANK.—No objection.

Mr. McCLANAHAN.—Q. Have you the diagram that you made Saturday?

A. I have. (Hands paper to Mr. McClanahan.)

Mr. McCLANAHAN.—We offer that in evidence.

(The paper just referred to was offered and received in evidence and marked "Libellant's Exhibit 13.")

Cross-examination.

Mr. FRANK.—Q. Mr. Lyle, I understand with reference to the value of this charge that you made for taking the chain off of the propeller tube of the "Siberia" that the value you fixed is based upon the fact that out in the ocean there it was an unusually dangerous operation?

Mr. McCLANAHAN.—Object to that as not proper cross-examination of this witness in rebuttal.

The COURT.—Overrule the objection.

Mr. McCLANAHAN.—Exception.

A. Yes, and the time of night also; taking everything into consideration.

Q. It was not based then upon what is the usual and ordinary charge in this port for diving operations, was it? A. No.

Q. If the vessel had been in the harbor and alongside the wharf, what would have been the usual and ordinary charge in Honolulu for **[367]** those services, per day?

(Testimony of J. A. Lyle.)

Mr. McCLANAHAN.—Objected to as immaterial, not conforming to the circumstances of the case.

The COURT.—I will allow the question.

Mr. McCLANAHAN.—Exception.

A. Our rates are $40 per day for diving.

Q. Mr. Lyle, after you had finished the work on the hub of the vessel we have been speaking of, how many times did you proceed over to buoy #1, near the lighthouse? A. Once only; only once.

Q. Who went with you on that occasion?

A. I was on the marine railway with Captain Fuller; came in a pilot boat and three men in the pilot boat, rowing, and he asked me to go to the lighthouse to have a look at the wire on the chain.

Q. Captain Fuller and three men?

A. Three men rowing the boat.

Q. But so far as parties interested were concerned, you and Captain Fuller were the only ones that went in that boat?

A. That went in that boat at that time.

Q. When you got over there, were there any other parties present?

A. Mr. Klebahn was there and whilst we were there they sent for Holloway and Lieutenant Slattery and we waited there until they came, then they took me back to the railway.

Q. Now, on this occasion I understand you to say that the wire lay on the dredge in the manner you have indicated here on "Libellant's Exhibit B"; is that right?

A. Well, something—near as I remember. The

(Testimony of J. A. Lyle.)

bight may have been round the scow a little more, but it was around the chain that way and that shackle there.

Q. It was clear and obvious to anybody who looked at it, as that diagram is? [368]

A. Yes, I think anybody could see the shackle and clamps that was on there.

Q. See it quite as clearly as you have seen it; if you saw the shackle you must have seen the events as you testified to them?

A. I examined the shackle and seen the tar was fresh.

Q. I am asking you if anybody had seen the shackle and clamps they must have seen them under the same condition that you have testified to?

A. Yes.

Q. As I understand you, you made a careful examination of the wire and the shackle and the clamps at that time? A. I did.

Q. You have been in the shipping business and ship repairing business for a great number of years, have you not? A. I was brought up at that.

Q. And know all about the kinds of materials and wires that are used in and about a vessel?

A. Yes; well, I don't profess to be a rigger, but when it comes to other classes, spar making and other things like that, I am an expert at that business.

Q. But you have handled during your business at all times different kinds of wires that go into rigging and wire cables that go into moorings, and things of that sort?

(Testimony of J. A. Lyle.)

A. Yes, I run a marine railway now where wires are used.

Q. And during that time you have had occasion to handle a large number of different kinds of wire cables during a period of a long number of years; isn't that right? A. Yes, sir.

Q. Now, in reference to the shackle which you have testified to, as I understood you on your direct examination, the large shackle [369] you only saw a small portion of the top of it; is that right?

A. Yes, sir; I seen enough of it to know it is what we call a six-inch shackle, or 1¼ inch iron.

Q. You saw the upper turn?

A. Yes, the upper turn.

Q. And about how far down on the arms?

A. There is a little bit of the arm, one arm, protruding; just so much as to know it was a shackle; the iron was protruding, and the upper turn.

Q. You really didn't see the bending in the arm, but you saw the upper turn and not sufficiently far down to disclose the bend in the upper turn?

A. No.

Q. As a matter of fact, you only saw about the width of the iron?

A. I seen enough of it to judge 1¼ inch iron.

Q. All you saw was the upper elbow about the width of the iron? A. Yes.

Q. And the conclusion that you came to was just a judgment that you formed from your observation that we have just spoken of? A. Yes.

Q. And this was also in the night-time and under

(Testimony of J. A. Lyle.)

the water, was it not? A. Yes, sir.

Q. And the means of observation there was more or less obscure, was it not?

A. Yes, could just make that out; in looking at anything under water we have to use our judgment; the diving hose will look twice as big as on land, and so will the shackle; but we are used to that and know what they are.

Q. It looks out of proportion, and you use your judgment in determining how much it is out of proportion? **[370]** A. Yes, sir.

Q. When you stated on your direct examination that all 6-inch shackles do not have the same breadth, you did not wish to be understood, did you, as saying that many six-inch shackles have not the same breadth, you only meant to say that there may be exceptions to that?

A. What I mean is, that any shackle that is under a strain comes together; you cannot tell by the measure across the shackle the exact width; a shackle that has been under a strain will naturally come together. The same with link chain, it comes together, and that is the reason they put a cross bar to keep them from coming together.

Q. In other words, a shackle that has been under a strain would be considerably narrower in its jaw than a new shackle that has not been?

A. Yes.

Q. And that's all that you mean by a difference in the size of these shackles? A. Yes.

Q. You do not mean that their original make is

(Testimony of J. A. Lyle.)

different, but that they may get different shapes and forms by the use they have been put to?

A. They vary a little in make too.

Q. To amount to anything?

A. Not much. Quarter of an inch, or something like that.

Q. Have you had anything to do with the manufacture of shackles?

A. Yes, a great deal to do with it; there is only one place in the United States we can buy shackles for our big chain that is running over a wheel. We have to send to Mobile. They make them there within 1/32d of an inch; a quarter-inch difference won't do, [371] the shackles have to be made to take the exact place of the link that goes around.

Q. Under these circumstances, then, would you say the shackles that you found under the tube of the "Siberia" and the shackle that you found on the wire of the chain on buoy #1 were the same size? In the very nature of things it can only be an approximation on your part.

A. They looked exactly the same size and style to me.

Q. But you could not be sure but that the jaw of one was a little more open than that of the other?

A. I couldn't be sure of the exact distance in between.

Q. Now, Mr. Lyle, I show you Libellant's Exhibit #2, and ask you whether by looking at it as it appears here you can determine whether or not it is in its original shape as manufactured, or whether

(Testimony of J. A. Lyle.)

it has changed its shape as you have suggested?

A. (Witness examines the shackle.) That shackle has changed its shape since it was manufactured.

Q. It has changed its shape? A. Yes.

Q. In what respect?

A. Because these prongs stand exactly square from the center when the shackle was made.

Q. In the arms you mean? A. In the arms.

Q. Then, if I understand you rightly, the prongs have drawn in where the bend goes in?

A. These prongs have drawn in.

Q. Where the bend goes in? A. Yes.

Q. And outside of that there is no perceptible change, is there?

A. No, no change. Turning those in would draw it a little together.

Q. Drawing the arms in would draw the shackle together very likely?

A. Yes, being out of square it would draw it in from the center like.

Q. To your eye does it present any appearance of being drawn out at [372] the arms except at the pin point? A. Yes.

Q. It does not?

A. Only these prongs here.

Q. Whether that was done on the tube of the propeller or done before it got there you could not tell?

A. No, I don't know.

Q. It may have been done on the tube of the propeller?

(Testimony of J. A. Lyle.)

A. It may have been somewheres else; I don't know.

Q. How long did you remain over at buoy #1 at the time of this visit?

A. I don't remember just how long I was there, but quite a little while there. It took Slattery a long time to get there I remember. If I remember rightly, I think Captain Fuller told us there was a steamer going out and Slattery had to finish some letters.

Q. You were there quite a long while?

A. Quite a long while.

Q. And all the time you were there this matter was in open view?

A. We sat there on the scow and Mr. Klebahn gave us a cigar apiece and we sat there and smoked it.

Q. And smoking didn't affect your vision, Mr. Lyle?

A. No, it did not affect my vision.

Redirect Examination.

Mr. McCLANAHAN.—Q. You were asked what the reasonable value of your services would have been worth if the "Siberia" had been at the dock. You replied that $40 per day was your charge for diving. Did you mean by that that you would, at the dock at night, have taken this wire off for $40?

A. No, I didn't mean any such thing.

Q. Do you know what the conditions at the dock that night would [373] have been?

A. I do not.

Q. Would the conditions have entered into the

(Testimony of J. A. Lyle.)

question of the amount which you would have charged?

A. Of course, the clearer the water the less time it would take.

Q. Will you please answer the question? Would the conditions existing at the dock have entered into your value of the services?

A. Well, the conditions at the dock it would have made a difference of how clear the water is. If it was after a freshet, after a rainstorm up Nuuanu the water would have been quite dirty and difficult to work in.

Q. That would have entered into the value of you services?

A. It would have taken a longer time.

Q. You have been examined quite carefully on this diagram showing the exact location of the wire, clamps, and shackle. Do you mean that it is an exact diagram showing such location?

A. It is the exact diagram showing how the wire was around the chain. That is what you asked me to explain.

Q. It is exact as showing where on the pile-driver the shackle and clamps lay?

A. I don't know exactly where they did lay. I know the wire was not the way I drew it there around that chain and laying on the pile-driver, but I don't just remember now, it is so long ago, exactly how the shackle was, whether under the wire or on top of the wire. I know we could see it.

Q. Under the loose wire?

(Testimony of J. A. Lyle.)

A. The loose wire that was laying on top of the pile-driver.

Q. On your cross-examination you testified that for years in your business you have handled wires.

A. Yes.

Q. Why was it that you did not know the lay of this wire which you found out on the pile-driver that day? **[374]**

A. I examined it but I could not tell which way the lay ran. I wasn't familiar enough to know and I know it is pretty hard for a man that ain't an expert wire man to tell right hand from left hand.

Q. And you didn't consider yourself expert enough to know that? A. No.

Q. Is there any reason why you should have especially examined the lay?

A. No, I had no reason to examine the lay.

Q. I hand you Exhibit #2 of the libellant's, and ask you if it is possible to bring together by a strain the two butts or ends of the shackle, without contracting the space between the shoulder?

A. The shackle, if you put a heavy enough strain on it from the center here, would draw in closer.

Recross-examination.

Mr. FRANK.—Q. Mr. Lyle, in answer to the question if you would have taken off the wire for $40, you said "No, sir." Do you mean that you would have done the whole job for $40?

A. No, I did not understand the question that way, if it was put that way.

Q. You would have done it at the usual rates per

(Testimony of J. A. Lyle.)

day for the time occupied?

A. Yes, if she was in the harbor.

Q. When you say upon your redirect examination that you do not remember now whether the shackle was on top or under the wire, do you mean to say that they were in such position that all of you did not have an equal opportunity of seeing where they were?

A. I don't know what the rest thought, but I know when I went there the bight was lying on top of the shackle, that I took up the [375] wire and looked at it and took up the clamps and looked at them.

Q. That was done in the absence of all these other men?

A. When I first went there I think Mr. Klebahn was there.

Q. And did you do it again when the other men got there?

A. I don't think so. I think the rest of them examined it; I seen them examining it.

Q. If you don't remember the detail of how the thing lay, how is it that you remember the detail of how it was fastened?

A. Because I took particular notice of how it was fastened. I wanted to prove that what I told them on the "Siberia" that night that it was just the same as I saw up there.

Q. You wanted to prove that?

A. Yes, I wanted them to notice it.

Q. And you think you did?

(Testimony of J. A. Lyle.)

A. I am sure I did.

Q. That was laying on your mind, and that is the reason it got fixed in your mind and that you are so testifying at the present time?

A. Yes, sir, I know exactly what I seen there and what I seen at the lighthouse; they were exactly the same size of wire, the size of the shackle, the size of the clamps.

Q. In that respect—is that the only respect in which they were exactly the same?

A. They were the same.

Q. In any other respect?

A. The color is the same, too.

Q. But that is the only respect by which you went at that time? A. Yes. **[376]**

Further Redirect Examination.

Mr. McCLANAHAN.—Q. Did you make any statement to the gentlemen there by way of informing them of the results of the examination or your proof, as you recall it?

Judge STANLEY.—Object to it as irrelevant, incompetent, and immaterial.

The COURT.—I don't see the materiality of this question. Objection sustained.

Mr. McCLANAHAN.—Exception.

Mr. McCLANAHAN.—That's all.

Mr. FRANK.—That's all.

Mr. McCLANAHAN.—I think that's our case. **[377]**

[Testimony of W. P. Fennell, for Libelee (in Surrebuttal).]

W. P. FENNELL, called as a witness on behalf of libellee in sur-rebuttal, being duly sworn, testified as follows:

Direct Examination.

Mr. FRANK.—Q. What is your name, please?

A. William P. Fennell?

Q. What is your occupation, Mr. Fennell?

A. Clerk to the Assistant Superintendent of Public Works.

Q. In your capacity as clerk to the Assistant Superintendent of Public Works what, if anything, have you to do with keeping the record of the time that the different men who work for the department are employed?

A. I keep all their time. The time is turned in to me at the end of the month in a small book and I make out the pay-roll from that small book.

Q. Have you a record in there of the date that a man by the name of Keawa worked in November, 1905? A. I have in the small book.

Q. Is it in the large book, also?

A. The time is in there, a copy is in there.

Q. The time is copied in there? I will ask you first is that the time on which he receives his pay?

A. Yes, sir.

Q. I will ask you to turn to your record and give us the dates on which he worked in the month of November, 1905?

Mr. DERBY.—Object to the witness referring to

(Testimony of W. P. Fennell.)
that book as it is plain that it is incompetent, irrelevant and immaterial and not the book of original entry and not a book which is competent or admissible in any way, and a book stating facts not within the personal knowledge of this witness and made up of reports **[378]** sent to him by others.

Mr. FRANK.—That is the record upon which the man was paid, and we will follow it up by the man's receipt for his pay.

Mr. McCLANAHAN.—It is objectionable on other grounds. Of what materiality is it and of what is it sur-rebuttal?

Mr. FRANK.—Well, if you want to know it shows that he never worked on the days he claimed to have been paid for.

The COURT.—Is that the official record?

Judge STANLEY.—It is the official record of the manner in which the appropriations for this particular work is expended. It is one of the records showing how the appropriation of the legislature for that bureau is expended.

The COURT.—It don't seem to be an official record, although it is a record which would obviously be kept.

(Here followed argument by counsel for both sides.)

The COURT.—Sustain the objection.

Mr. WATSON.—Exception.

Mr. FRANK.—Now, we offer to prove by this witness that he kept the record of the time of the men who worked for the Government as it was handed to

(Testimony of W. P. Fennell.)

him, the dates on which they worked, and from that made up his pay-roll and paid these men, and the book which the witness has in his hands we asked him to use to refresh his memory in respect to these dates, the entries therein having been made by himself from the rough book that was handed in to his office; and also we offer to supplement it by the receipt of Keawa for eleven days' work in November. We make the same offer as relating to Keawa and Pololu.

Mr. DERBY.—Object to the offer on the ground that the evidence will be hearsay; on the ground that it is not a book of original **[379]** entry, that it is not the best evidence and that it purports to be a record of fact not within the personal knowledge of the witness, but obtained from reports made to him by others and that it is incompetent, irrelevant and immaterial.

Mr. FRANK.—I wish to add this fact to our offer. That is that this witness is the witness who made the payments to Keawa and Pololu, and the offer is to show that neither of these witnesses received any pay from the Government for the 11th day of November, 1905.

Mr. McCLANAHAN.—I desire to add the further objection to the one made by Mr. Derby: First, that it is not a book required by law to be kept, and second, that there is no identification of the Keawa with the Keawa who is the witness in this case; third, that there is no evidence offered to show that this was the only work or that Keawa was paid through this

(Testimony of James Morse.)

department and not some other department, and on the further ground that Keawa testified that his boss was Jim Morse and Jim Morse was in the jurisdiction of this Court and would be the man who would probably know more about the thing than anyone else.

The COURT.—I will sustain the objection on all the grounds except that it was incompetent, irrelevant and immaterial, and that Keawa was not identified.

Mr. FRANK.—Exception.

Mr. FRANK.—That's all. **[380]**

[Testimony of James Morse, for Libelee (in Surrebuttal).]

JAMES MORSE, called as a witness for libellee in sur-rebuttal (having been previously sworn on the main case), testified as follows:

Direct Examination.

Mr. FRANK.—Q. Mr. Morse, what was your position in the Department of Public Works of the Territory of Hawaii in November, 1905?

A. Superintendent on the wharves, foreman on the wharf department.

Q. Did you keep the time of the men who worked for the Government during that time?

A. Yes, sir.

Q. I show you a book here and ask you whether or not that is your time-book for the month of November, 1905, in which you marked the time of the men that worked for the Government?

(Testimony of James Morse.)

A. Yes, sir, that is the time-book.

Q. And were they paid according to the time entered on this book? A. Yes, sir.

Q. (The COURT.) It seems to me that the proper course would be to let him refer to the book and ask him in regard to these men.

Mr. FRANK.—Q. Mr. Morse, during November, 1905, did a man by the name of Keawa work for the Government under you as foreman?

A. Yes, sir.

Q. Was that Keawa, was his name entered in this book for his time during the month of November?

A. Yes, sir.

Q. Is that the entry that I now show you on the page of the book marked "Time-book of the month of November, 1905"? A. Yes, sir.

Q. Was that the same Keawa that you sent up to Mr. McClanahan **[381]** as a witness in this case?

A. Yes, sir.

Q. Was there another man by the name of Pololu, whose name is entered on this page, who worked for the Government at that time? A. Yes, sir.

Q. Is that the same man you sent up to Mr. McClanahan?

A. No, I didn't send Pololu, merely notified Keawa but not Pololu.

Q. Was that Willie Pololu that was working at that time?

A. There was three Pololus worked for me, Willie Pololu and another Pololu, three brothers.

Q. Which Pololu is it that you have on this record

(Testimony of James Morse.)

here of the time-book for the month of November, 1905—which Pololu is that?

A. That is the Pololu they had working in the, sweeping in the other grounds there (indicating the grounds of the Executive Building).

Q. What is his name? A. Willie Pololu.

Q. His name was Willie Pololu? A. Yes.

Q. Did you make these entries yourself, is that your handwriting? (Showing.)

A. Yes.

Q. These are correct entries of the time these parties worked for the Government during that time?

A. Yes.

Q. Now, there is another page in this book in which it is headed "Buoys and Moorings"? **[382]**

A. Yes, sir.

Q. And we find on that the name of Keawa, is that the same Keawa you have testified to?

A. Yes, sir.

Q. And we find also the name of Pololu,—is that the same Pololu? A. Yes, sir.

Q. And is that a correct entry on that page of the dates these two men worked on buoys and moorings in the harbor for the Government?

A. Yes, sir.

Mr. FRANK.—We offer this book in evidence.

Mr. McCLANAHAN.—The entries,—or are you offering the whole book?

Mr. FRANK.—These two pages that I have referred to,—I don't know anything about any other entries that are in there, I haven't looked at them.

(Testimony of James Morse.)

There is one and there is the other (showing), one with the month of November, 1905, and the other is "Buoys and Moorings."

Cross-examination.

Mr. McCLANAHAN.—Q. Mr. Morse, when were these entries made on the first written or penciled page of the book?

A. The first page, that is the whole work. I will explain so you can understand how the time was kept, if I worked on buoys and moorings I had to put down time "Buoys and Moorings" so as to get the right appropriations; if I worked on Kinau wharf, I put it in one place, and on Harbor Improvements—I [383] had this kind of work to do and refer back to it on the first page, the whole amount of work that was done.

Q. Buoys and moorings, referring back to the first page, means the total amount of work done?

A. Yes; it was to go in the same appropriation. If on Harbor Improvements that was referred to the first page, if I worked for the pilot-house down here they generally go on the first page, that is a different appropriation.

Q. When were the entries made on the first page?

A. Sometimes I entered them every day, sometimes it would go along two days and I would enter them.

(The book in question was received in evidence and marked Libellee's Exhibit "O.")

Mr. FRANK.—I don't think we can take that book from the public records. I would suggest that we

(Testimony of James Morse.)

have a certified copy made.

The COURT.—Mr. Morse have you done with that book? A. That belongs to the office.

The COURT.—Can it remain here until this case is disposed of?

A. I will have to refer that to the Superintendent of the Public Works, it is in Mr. Fennell's charge.

The COURT.—(To Mr. Fennell.) That book is through with in the public accounts?

Mr. FENNELL.—Yes, sir; we only keep it as a record.

The COURT.—Can it go in with this case as an exhibit?

Mr. FENNELL.—I think so, but I would prefer to get permission from Mr. Holloway or Mr. Howland.

The COURT.—It is just as safe here as it is over there. I will admit it as an exhibit. **[384]**

Mr. McCLANAHAN.—Q. You have been subpoenaed from Kauai since you last testified in this case, have you?

Mr. FRANK.—The record is the best evidence as to whether or not he has been subpoenaed. He has not been subpoenaed.

Mr. McCLANAHAN.—You have not?

A. This time?

Q. Yes? A. No, sir.

Q. How did you come down here?

A. Through the order of the Superintendent of Public Works, Mr. Holloway sent a wireless down Saturday. I got it at 3 o'clock to take the first

(Testimony of James Morse.)

steamer to Honolulu.

Q. What was the object of your coming—have you learned that since?

A. No, I saw Mr. Holloway and he referred me to Mr. Frank.

Q. And you expect to leave as soon as you have finished here for Kauai?

A. I expect to leave to-morrow night if they get through with me.

Q. You remember this man Keawa very well, don't you? A. Yes, sir.

Q. Do you remember the day that he went out to buoy No. 1 with a pile-driver and lifted that buoy up?

Mr. FRANK.—Objected to that as not being cross-examination upon anything that was brought out upon direct examination.

The COURT.—Overrule the objection.

Mr. FRANK.—Exception.

Q. Who was Keawa working for on that day?

Mr. FRANK.—Object to that upon the ground that it is not proper cross-examination of the subject matter brought out in [385] the direct examination.

The COURT.—Overrule the objection.

Mr. FRANK.—Exception.

A. Working for me for the territory, I suppose.

Q. For the territory, do you know what day of the month of November that was?

A. No, sir.

Q. Suppose I should say to you that that was the 11th of November; I will ask you why he is not cred-

(Testimony of James Morse.)
ited on the 11th day of November for that day's work, but is credited on the 10th? Isn't that 10th a mistake and should it not be the 11th?

A. No, sir. You see now I got to explain matters, how I carried my time down at the Government shop. If I work a couple of hours on a job, a small job and from there transfer all day on a full job, I charge the next job a full day and don't charge anything for the small job. I had to regulate my time, instead of making it two or three or four hours, making it a half a day or a whole day. If I worked on that for a few hours, I would take the gang and put it for a whole day and don't charge any half days.

Q. Will you tell me how you gave Keawa credit for the work performed on the 11th of November, taking my word for it that that was the date the work was performed on buoy No. 1?

Mr. FRANK.—Object to counsel testifying that it was that particular date when that is the very issue before the Court.

Mr. McCLANAHAN.—Mr. Morse, my question was, did Keawa do any work at buoy No. 1 after the "Siberia's" accident? A. Yes, sir.

Q. What did that work consist of?

A. To lift the buoy up and see if anything was on it, and for parties to examine it. [386]

Q. That was done on one day, wasn't it?

A. It was done on one day.

Q. What other work was done at that buoy after that?

A. He took it away and put it on the wharf.

(Testimony of James Morse.)

Q. Was that done on the same day?

A. No, sir.

Q. Now, assume, Mr. Morse, that the work done first by Keawa of lifting up the buoy was done on November 11, 1905, will you explain why he did not have credit for it in this time-book of yours?

Mr. FRANK.—Object to that on the grounds above stated, and further that it doesn't appear that he did work on the 11th so far as this is concerned.

The COURT.—If that date of taking up of the buoy was established you have got all you want by proving that Keawa did it.

Mr. McCLANAHAN.—Does it appear in your book that Keawa has been credited for some work done in lifting up buoy No. 1? A. On the 14th.

Q. On the 14th of November? A. Yes, sir.

Q. How much is the credit on the 14th of November? A. One day.

Q. Did it take him a whole day to do that work?

A. Lifting out the buoy didn't take a whole day, that is the anchor and everything.

Q. Lifting it up took how long?

A. Only a couple of hours.

Q. It was on the 14th he worked all day, was it?

A. He didn't work all day.

Q. Not in taking it up but in removing it, did he work all day? [387] A. Yes, sir.

Q. I am not talking about where the pay for the removal of it occurs, but where is his pay for lifting it up? Is that on the 14th of November?

(Testimony of James Morse.)

Q. Well, I don't remember exactly the day of the month; it was a couple of hours and was a short while only and I have got him booked down on the Sorenson wharf, charged to Sorenson's wharf.

Q. In this credit to Keawa on November 14, $2.50, does that include the lifting up of the buoy?

A. Maybe that was lifting up the buoy, or examining the buoy.

Q. When I say lifting up the buoy, I mean lifting it up for examination. A. The last time?

Q. No, the first time. Does that credit on the 14th of November include the first work on Keawa in lifting up the buoy?

A. I don't know whether the buoy was examined on the 11th or the 14th.

Q. I want to know whether the credit to Keawa on the 14th includes the work done on the examination of the buoy?

Judge STANLEY.—The witness has just testified he doesn't know whether the work was done on the 11th or the 14th.

The COURT.—He has a right to ask whether the work that was paid for was done on the occasion mentioned.

A. Well, it is so far away, I can't remember, but we charged that time. On the charge here, I don't know whether that statement of buoys shows when he examined it. I couldn't tell.

Q. You know Keawa was paid by the Government for the work of lifting up the buoy for examination?

A. Yes, he was paid.

(Testimony of James Morse.)

Q. Do you know Pololu was paid by the Government for the work [388] of lifting up the buoy?

A. Yes, sir.

Q. And that is the time Captain Fuller and some of the other gentlemen were out to the buoy?

A. Yes.

Q. And they were paid by the Government?

A. Yes.

Redirect Examination.

Mr. FRANK.—Q. And in so far as you know, the dates on which they did their work were correctly entered in this book, is that right?

A. Correctly entered, yes.

Q. On the date and at the time the work was done?

A. Yes, sir, but when I handle any buoys,—I don't know the exact date of taking the buoy ashore and examining it. After they examined the wire on the buoy, then took the buoy ashore.

Q. Now, in reference to the short time that you have spoken of, that possibly you have entered up at another time, you say it is a couple of hours?

A. If I worked on a job a couple of hours and got through and transferred my men to the next job, I charged it to the last job.

Q. How many hours a day do your men work?

A. Eight hours.

Q. And a couple of hours would be a quarter day?

A. Yes, sir.

Q. I will show you an entry of one-quarter day of Silva, first of November, is that right?

(Testimony of James Morse.)

A. Yes, sir. **[389]**

Q. And half a day on quite a number of men in that same month? A. Yes, sir.

Q. Now, there are quite frequent entries here of quarter-days, are there not? A. Yes, sir.

Q. All through the book? A. Yes, sir.

Q. Do you know how long they were out altogether at that buoy that day?

A. No, sir; I don't know.

Q. You don't know whether it was a quarter day or a half a day?

A. It was about a quarter of a day.

Q. And that would naturally, if it happened, have been entered as a quarter of a day, as it happened?

A. Sometimes I would make a quarter day on that date and then charge it on the next work.

Q. But you didn't keep it four or five days on your mind, did you?

A. No, sir. I make my time-book in the evening and if the men only worked two hours I would put it in that way.

Q. If they finished the job on the next day, you would put it in the next day, but you never carried it over three or four days, is that right?

A. If they worked a quarter of a day, suppose they worked two hours, and nothing more, I would make it two hours, and if nothing more would be done, I would give them a quarter of a day for it, and sometimes if they have a small job and finish it up and go to another place I would charge it on the big job.

(Testimony of James Morse.)

Q. But on the same day?

A. Yes, but if they wound up in a quarter of a day I would put that down. **[390]**

Q. If they worked at all on any date, that will appear on that date, but if they worked on two different jobs on one day, only two hours on one job and six hours on another job, you would segregate it, as all one job—if they had worked on one job, they would have a whole day, wouldn't they?

A. And if they only worked a few hours they would have half or a quarter day.

Recross-examination.

Mr. McCLANAHAN.—Q. I will have to ask you where the work performed by Keawa appears on the book. You said he was paid and credited for it. Where does it appear in the book; does it appear on November 14th?

A. I looked in the book; I got no time charged to Keawa on the 11th.

Q. Then when was he paid for that work?

Judge STANLEY.—The witness has testified he does not know that he did any work on the 11th.

Mr. McCLANAHAN.—Withdraw the question.

Q. Will you please take the book and show me where Keawa was credited with work performed in picking up the buoy the first day when it was examined and before its removal?

A. I can't remember when it was. I don't remember whether the buoy was taken up on the 11th or the 14th. I can't remember that. It would be impossible to show on what date the buoy was taken

(Testimony of James Morse.)
up because I don't remember whether it was the 11th or the 14th.

Q. Let us assume that it was on November 11, that it was taken up; when was Keawa credited for that day? **[391]**

A. He wasn't credited on the 11th, but was credited on the 14th.

Q. When would he be credited for work done on the 11th if it was not in on the 11th?

Judge STANLEY.—Object to that as incompetent, irrelevant and immaterial, and on the further ground that the witness has already stated that he did not know whether that work was done on the 11th.

The COURT.—Sustain the objection.

Mr. McCLANAHAN.—Exception.

Mr. McCLANAHAN.—Q. I have to insist, Mr. Morse, upon your pointing out in the book where Keawa was credited for picking up that buoy for examination the first time he touched it?

Mr. FRANK.—Same objection.

A. Well, I couldn't find out in the book on what day he was credited for that; it shows here that I have charged harbor mooring on the 14th, one day.

Q. Now, isn't it possible that you lumped into that charge of the harbor moorings the taking up of the buoy, the work which Keawa had previously done when he lifted it up for examination?

Mr. FRANK.—Objected to that as not proper cross-examination.

The COURT.—Overrule the objection.

Mr. FRANK—Exception.

(Testimony of James Morse.)

A. No, I don't think so.

Q. Then, I will have to ask you if it is impossible for you to find in the book the credit for Keawa's work done when he lifted the buoy for examination?

A. It is possible that I charged time for examining the buoy; it must be on the 13th. If I had charged any time it should be on the 13th, put it on the Sorenson wharf where Keawa had worked on the 13th. The examination of the buoy may have been on the 13th. **[392]**

Q. You know, as a matter of fact, that he did that work for the Government and was paid for it?

A. He did the work for the Government and got pay for it. Keawa is credited to Sorenson's wharf for the 13th.

Mr. FRANK.—But he is credited to buoys and moorings on the 14th?

A. Yes, that was when he took it away. I don't remember whether for one day or two days or three days.

Mr. FRANK.—That's all.

Mr. McCLANAHAN.—That's all. **[393]**

[Testimony of W. P. Fennell (Recalled).]

W. P. FENNELL, recalled.

Mr. FRANK.—Q. Now, Mr. Fennell, from what book, if any, did you rake up the pay-roll?

A. From that book. (Pointing.)

Q. From this book, referring to Libellee's Exhibit "O"? A. Yes, sir.

(Testimony of W. P. Fennell.)

Q. From this book. I show you a document now and ask you what that is?

A. That is the original pay-roll as made from that book. The complete pay-roll made from that book.

Q. Now, on that original pay-roll do you find the signatures of Keawa and Willie Pololu?

A. Yes, sir.

Q. And does that indicate the amount received by each of these persons for November, 1905?

A. Yes, sir.

Q. For work done for the Government?

A. Yes, sir.

Q. And does it also indicate the number of days?

A. Yes, sir.

Mr. FRANK.—We offer it as evidence.

Mr. FRANK.—Q. Are these the signatures of Keawa and Willie Pololu attached to this document? (Pointing.)

A. Yes, sir.

Mr. McCLANAHAN.—I would like to ask counsel what the object of this offer is.

Mr. FRANK.—It is to prove their admission of the number of days they worked during that month and for which they received pay [394] in accordance with the book already in evidence.

Mr. McCLANAHAN.—Object to it as it does not show the dates paid for by that. Object to the evidence as not being limited to any particular 11 days in the month of November.

(Mr. Watson argues.)

Mr. McCLANAHAN.—We will make the admission on the record that he worked 11 days in November and received $27.50.

The COURT.—I don't see how this is material in the least degree. I will sustain the objection.

Mr. FRANK.—Exception.

(The document was, at Mr. Frank's request, marked for identification Libellee's Exhibit "X.")

Mr. FRANK.—That's all.

Mr. McCLANAHAN.—That's all. **[395]**

[Proceedings Had March 25, 1907.]

[Recital re Motion to Strike Certain Testimony of Hamilton et al., etc.]

AFTERNOON SESSION.

March 25, 1907.

At the opening of the afternoon session of Court, Mr. Frank proceeded to take up the motion to strike out certain portions of the testimony of Hamilton, Morse and Campbell, upon which final ruling had been reserved.

Mr. FRANK.—Your Honor will notice that on page 239 of Campbell's testimony, in respect to the general testimony of Mr. Campbell regarding the sale of wire to the dredging Company, the discussion closes as follows: (Reading from page 239:) "The Court: It looks to me as though this evidence could be of no use to the Court unless it is definite as to time. The question in my mind is whether it has the elements of materiality. I will hold to that ruling. It shall go out unless there is evidence fixing a sale at a period before or on the 4th of Novem-

ber." There has been no evidence introduced in that respect, and therefore I understand that all that testimony is to go out.

The COURT.—That is all the evidence attached to the sale?

Mr. FRANK.—Yes, all the evidence that he sold wire to the dredger. The matter was here argued by counsel for both sides.

The COURT.—I will allow the motion.

Mr. McCLANAHAN.—Does that apply to all of Campbell's evidence?

The COURT.—No; concerning the sale of wire to the dredging company. The books have failed to show anything except wire sold on the 6th.

Mr. McCLANAHAN.—Exception.

Mr. FRANK.—We have finished our sur-rebuttal.

Mr. McCLANAHAN.—Then we rest.

Mr. Frank here took up the matter of Hamilton's testimony, and asked the Court to order stricken out the testimony beginning on page 8 with the question, "I hand you two sheets of paper, and ask you if you can identify them? A. Yes, sir," and so on, continuously to the bottom of page 14. This was objected to by Mr. McClanahan, who claimed that certain questions and answers on the pages mentioned [396] would not properly be subject to counsel's objection, specifying the following example: At the bottom of page 11, "Q. Aside from the question of the exact time, there may be other errors, so far as your knowledge is concerned; for instance, are you prepared to swear that the fifth signal received in the engine-room was 'full

ahead'? A. I am, that is what I am down there for." Also on page 12, the following: "Mr. McClanahan: Q. Will you please, from the inspection of the copy of the log, state at what hour,—can you state independently, Mr. Hamilton, of the inspection of the log-book, at what hour the 'Siberia' first began to move her engines in backing out from her berth on the afternoon of November 10th, 1905? A. Without consulting the log-book? Q. Yes. A. I know it was shortly after five, but the minute I couldn't, without consulting the log-book."

The COURT.—From the bottom of the 12th page and the top of the 13th down to the second question, what objection is there to that?

Mr. FRANK.—Because the witness was holding the sheet before him, and still testifying from it.

The COURT.—I shall rule that those two questions should remain in, because the words show that he was testifying without consulting the log-book then.

Mr. FRANK.—Exception.

Mr. McCLANAHAN.—I should like a ruling on the question on page 11: "Q. Aside from the question of the exact time, there may be other errors, as far as your knowledge is concerned; for instance, are you prepared to swear that the fifth signal received in the engine-room was 'full ahead'? A. I am; that is what I am down there for." And also on page 11, "Q. And you are prepared to swear that the next succeeding signal to that was 'stop'? A. Well, I am supposed to look at the telegraph every time it is rung, to see if they get a bell to go astern

they wouldn't move ahead."

Mr. WATSON.—That shows that he had the memorandum in his hand all the time. [397]

The COURT.—The question really is whether he was testifying from his memory. He says: "I am supposed to look at this telegraph," etc. Is there anything there to show that he is testifying from the log-book?

Mr. WATSON.—He had the memorandum in his hand all the time; I don't think counsel will dispute that.

After argument the Court allowed the question, the same being the question on page 11, beginning "Q. Aside from the question of the exact time, there may be other errors," etc., and also allowed the answer thereto to remain in the record.

Mr. FRANK.—Exception.

Mr. McClanahan asked that the last question on page 13, together with Mr. Watson's statement in relation thereto, and the answer, on page 14, be allowed to stay in. The Court ordered this stricken out, under Mr. Frank's original motion.

Mr. McCLANAHAN.—Exception.

Mr. McClanahan next referred to the following, on page 14, and asked that it be allowed to remain in the record:

"Q. After the bell at 5:27 when you stopped your starboard engine, when did you next start her?

"A. The following morning.

"Q. The morning of November 11th?

"A. Nov. 11th, yes, sir, shortly after 1 A. M. I believe.

"Q. After the stoppage of the starboard engine at 5:27 did you learn the reason for it?

"A. Yes, sir. I was notified from the bridge by telegraph."

Mr. McClanahan stated that he would consent that the hour, 5:27, be eliminated, but submitted that the rest was not hearsay evidence. After argument the court ruled that the testimony should go in.

Mr. FRANK.—Exception.

Mr. Frank here moved to strike out the testimony beginning on page 15, "Q. Did the engine, the starboard engine of the 'Siberia,' at the hour of 5:23, when the bell was given 'full astern,' indicate [398] that there was anything the matter with the propeller," continuing from there to and including the answer near the top of page 16, "A. That relieved the tension."

The COURT.—I will allow it all, down to the second answer on page 16.

Mr. FRANK.—We take an exception to your Honor's ruling as regards that portion of it beginning with the question on page 15 "Q. Did the engine, the starboard engine of the 'Siberia' ", etc., down to and including, on the same page, the answer, "A. By the engine not turning strong enough," on the same grounds as the objection as to testimony from this log-book and log-sheet, and we make a separate objection to that part of the testimony on the same page beginning with the question, "Q. Do you know, Mr. Hamilton, what the trouble was," etc., including the answer, "A. Buoy chain and wire rope being fouled on the star-

board propeller," as being hearsay. We take exception to the ruling on these grounds.

The COURT.—Page 16 is all out, unless they ask to have it put in?

Mr. FRANK.—I object to it all, but I am discussing now only what comes within the Court's ruling. Commencing with the question, "Q. At 5:27, when you had the 'stop' bell for the starboard engine, did you use the port-engine after that?" I object to the rest of the page. The last answer on the page has already been ruled out.

Mr. McCLANAHAN.—Submit that the second question from the bottom of the page, reading as follows, should stay in: "Q. Where did you subsequently go to? A. After they rang off the engine I went up to the bridge. Q. Will you please tell us what took place on the bridge when you went there? A. There was nobody up there but the third officer. I asked for the captain, they told me he was on the stern of the ship. I went aft, and they had just come aboard I believe, I am sure, the captain, the chief officer and I believe the pilot," "so I asked the captain—" should go out. Then in the next answer on page 17, that part commencing "The divers came after, I should judge, an hour or so, the diver and a couple of assistants, his line tender and boat pullers, a man to work the pumps, five or [399] six in the party, but only one diver."

Mr. FRANK.—The last question on page 16, the first answer on page 17, in regard to conversations with the captain and the diver, as well as subsequent answers on subsequent pages, and page 18, in regard

to conversations, were all ordered by the Court to be stricken out on the ground that it is hearsay evidence. This portion of it was left in: "The divers came after, I should judge an hour or so, the diver and a couple of assistants, his line tender and boat pullers, a man to work the pumps, five or six in the party, but only one diver." That has all been ruled on before. On page 16, I understand that all that testimony regarding the time is within the ruling of the Court?

Mr. McCLANAHAN.—Beginning with the question, "At 5:27, when you had the 'stop' bell," etc.?

The COURT.—Yes.

Mr. FRANK.—The rest of the page?

Mr. McCLANAHAN.—No. "Q. Where did you subsequently go to?" and the answer should go in.

Mr. FRANK.—That is out, according to the record.

The COURT.—I think from the second question from the bottom of page 16, to the words "so I asked the captain—" at the bottom of the page should stay in. From the commencement of the question, "Q. Where did you subsequently go to?" down to the last line to the word "pilot," inclusive, is allowed in.

Judge STANLEY.—Exception.

The COURT.—On page 17, the words, "The divers came after, I should judge, an hour or so, the diver and a couple of assistants, his line tender and boat pullers, a man to work the pumps, five or six in the party, but only one diver," that goes in; and also "So he told the diver what was wrong, and he went down, I should judge he was down ten min-

utes then he came up." The former ruling may be amended.

Judge STANLEY.—All the rest of the page goes out? [400]

Mr. McCLANAHAN.—No—at the bottom of the page, "The witness: He went down and he was working a hacksaw, you could hear him quite plainly on the surface, sawing something: He came up several times and we tried to break it" should not go out.

The COURT.—At the bottom of page 17, the last three lines to and including the words "break it" are allowed to stay in, and at the top of the 18th page the words "and we tried to break it with a strain from the capstan" are allowed to go in, striking out the words "he told us it was a wire cable."

Mr. McCLANAHAN.—On page 18 this should go in: "The witness, continuing: When the diver came up after making the report he unreved some chain, four or five turns, then he told us the buoy was fast by a cable, and he went down to saw this cable, every time he came up we would try again to part it."

The COURT.—On page 18, beginning with the sixth line from the top that paragraph is allowed to remain in except the words, "he unreved some chain, four or five turns, then he told us the buoy was fast by a cable."

Judge STANLEY.—And "he went down to saw this cable"?

The COURT.—I will allow that.

Judge STANLEY.—Exception.

The COURT.—All the rest of page 18 is allowed

except the words just below the middle of the page "Q. How did you get the chain off the shaft? A. He unrove the chain, so he said."

Mr. WATSON.—On page 19, we think it is hearsay, the 3d line in the long answer, "the last time he came up he said he would have to give it up, one man couldn't clear it, he said, as it was a big job. We asked him how long it would take, he said he had no idea, he would have to get assistants. I asked him if the chain was all off and he said yes. I asked him where this wire was, and he told me on the end of the sleeve. I asked him about how much, well, he said he should judge twelve or fifteen turns, so I talked with the captain for a while." Submit that should go out. **[401]**

The COURT.—I think it is admissible, hearsay testimony and objected to, but it is admissible as showing upon what information the engineer and the captain decided to take the ship to sea without further repairs.

Mr. FRANK.—Exception.

On page 20, the Court allowed everything to go in. To the admission of the statement on that page, where the witness said, "I merely guessed at the time," etc., Mr. Watson objected, as being a conclusion of the witness.

The COURT.—I will allow it to go in.

Mr. WATSON.—Exception.

Mr. WATSON.—That is all of Mr. Hamilton's testimony, Mr. Morse's testimony is to be ruled on now.

Mr. McClanahan referred to the question in Mr.

Morse's testimony, at the bottom of page 103: "Do you know of the dredger's using a large anchor," etc., and upon the statement of Mr. Frank that that was not rebuttal of anything the Court stated that it would prefer to look over the evidence in that respect and rule on the same later.

Mr. McCLANAHAN.—Can we suggest that it would be helpful for the Court to read the whole of Matson's and Spencer's evidence, before deciding this question?

Mr. FRANK.—I join in the request of counsel, that your Honor read the whole of it.

Mr. DERBY.—In case the Court should rule out the testimony of Morse, this right lay wire (referring to Exhibit) should still be allowed to stay in, as it was picked out by Keawe.

It was here agreed between counsel and the Court that argument of the case should begin on Tuesday, April 2d, at 10 o'clock of that day, and at this time Court adjourned until March 27th at 10 A. M., and the Court stated that its ruling on the subject of Morse's testimony would be given on April 2d, at the time of the argument. **[402]**

Certificate of Stenographer.

Honolulu, T. H., March 26th, 1907.

I hereby certify that the foregoing transcript, consisting of 402 typewritten pages, is a full, true and correct copy of my shorthand notes taken at the trial of the above-entitled cause, and as such is entitled to faith and credence.

(Sgd.) A. A. DEAS,
Reporter U. S. District Court.

[Endorsed]: No. 71. (Title of Court and Cause.) Transcript of Testimony Filed. April 5th, 1907. (Sgd.) Frank L. Hatch, Clerk.

Order Re Cancellation of Bond.

From the Minutes of the United States District Court, Vol. 4, Page 417, Wednesday, March 27, 1907.

[Title of Court and Cause.]

The Court on this day, pursuant to motion of proctors for libellee heretofore made herein, and consent of proctors for libellant heretofore given herein, ordered that the bond to the United States Marshal for this District given by the libellee and claimant herein on March 26, 1906, and running in the sum of $60,000.00, be cancelled by the clerk of this Court upon the substitution by said libellee and claimant of a new bond running to said United States Marshal in the sum of $30,000.00.

[Minutes] Hearing—April 2, 1907.

From the Minutes of the United States District Court, Vol. 4, Pages 421-422, Tuesday, April 2, 1907.

[Title of Court and Cause.]

Now comes Mr. E. B. McClanahan, of proctors for libellant and moves the Court that the words, "Upon request of Mr. Frank, the Court examined the witness on his qualifications" be inserted at the top of page 212 of the transcript of the testimony in this cause, the page referred to being a part of the testimony of

the witness Ralph Harrub, and no objection being interposed the motion is granted and the exception to such rending, taken by libellee is allowed. And thereupon the Court hears argument of this cause and the hour for adjournment having arrived this cause is ordered continued for further argument until Wednesday April 3, 1907, at 10 o'clock A. M.

[Minutes] Hearing—April 3, 1907.

From the Minutes of the United States District Court, Vol. 4, Page 423, Wednesday, April 3, 1907.

[Title of Court and Cause.]

Now again came the above-named parties by their respective proctors and further argument of said cause is had, and the hour for adjournment having arrived, the further argument of this cause is ordered continued until Thursday, April 4, 1907, at 9:30 o'clock A. M.

[Minutes] Hearing—April 4, 1907.

From the Minutes of the United States District Court, Vol. 4, Pages 425-426, Thursday, April 4, 1907.

[Title of Court and Cause.]

Now again come the above-named parties by their respective proctors and the further argument of this cause is had at the conclusion of which said cause is submitted on briefs to be filed as follows: Libellant to have until April 30, 1907, within which time to pre-

pare and file its brief herein, and libellee to have until June 10, 1907, within which time to prepare and file its brief in reply thereto, and libellant to have five days from June 10, 1907, within which time to prepare and file its closing brief.

Order Re Filing of Briefs.

From the Minutes of the United States District Court, Vol. 4, Page 484, Saturday, April 27, 1907.

[Title of Court and Cause.]

Now comes Mr. S. H. Derby, of proctors for libellant, and moves that the time heretofore fixed for the filing of briefs herein be continued as follows: Libellant to have until May 11th, 1907, within which time to prepare and file its brief and Libellee to have until July 1st, 1907, within which time to prepare and file its reply brief, which said motion the Court grants and it is so ordered.

Order Extending Time for Libelee to File Brief.

From the Minutes of the United States District Court, Vol. 4, Page 524, Monday, June 17, 1907.

[Title of Court and Cause.]

Upon motion of Mr. E. M. Watson, of proctors for libellee, it is ordered that the time for libellee to file its brief herein, be extended from July 1, 1907, to July 15, 1907, Mr. E. B. McClanahan, of proctors for libellant, being present during the hearing of said motion.

Order Extending Time for Libelee to File Brief.

From the Minutes of the United States District Court, Vol. 4, Page 576, Wednesday, August 14, 1907.

[Title of Court and Cause.]

Now comes Mr. E. M. Watson, of proctors for libellee herein, and presents in open court for filing a portion of libellee's brief herein, which the Court ordered filed, and upon the statement of said proctor for libellee, to the effect that the balance of said brief would be filed in a few days it was ordered that libellant have five days from the date of the filing of the balance of said brief, within which time to prepare and file its reply brief.

In the District Court of the United States for the Territory of Hawaii.

No. 71.

PACIFIC MAIL STEAMSHIP COMPANY (a Corporation),

Libellant,

vs.

The Dredger "PACIFIC," Her Tackle, Apparel, etc.,

Libellee.

Notice of Appearance [for Libelant].

You will please to take notice that we have been retained by and appear for the Pacific Mail Steamship Company, libellant in the above-entitled cause,

and hereby request that all documents and papers in said cause hereafter to be filed or served shall be served upon us as Attorneys for the said Pacific Mail Steamship Company, a Corporation, at our offices in the Stangenwald Building, Honolulu, Territory of Hawaii.

Dated, Honolulu, January 3, A. D. 1908.

(Sgd.) KINNEY & MARX,

Attorneys for the Pacific Mail Steamship Company, a Corporation.

To Holmes & Stanley, Esq., and E. M. Watson, Esq., Attorneys for Libellee.

[Endorsed]: No. 71. (Title of Court and Cause.) Notice of Appearance. Filed Jan. 3, 1908. Frank L. Hatch, Clerk. By (Sgd.) A. E. Murphy, Deputy Clerk.

In the United States District Court for the Territory of Hawaii.

PACIFIC MAIL STEAMSHIP COMPANY,

Libellant,

vs.

Dredger "PACIFIC,"

Libellee.

Motion to Amend Libel.

Now comes the libellant in the above-entitled cause, by its proctors, Kinney, Ballou, Prosser & Anderson, and moves to amend its libel herein by striking out the word "four" immediately preceding the word "days" in paragraph 8 of said libel, and

inserting in its place "five," so that the clause in said paragraph 8 relating to the detention of the steamship "Siberia" shall read:

"Consumed the whole of five days and four nights while said steamship was in said dry dock."

This motion is made to make the pleadings conform to the proofs adduced and is based upon the record.

Dated October 14, 1909.

PACIFIC MAIL STEAMSHIP COMPANY,
By (Sgd.) KINNEY, BALLOU, PROSSER & ANDERSON,
Its Proctors.

[Endorsed]: #71. (Title of Court and Cause.) Motion to Amend Libel. Filed Oct. 14, 1909. A. E. Murphy, Clerk. By (Sgd.) A. A. Deas, Deputy Clerk.

Order Granting Motion to Amend Libel.

From the Minutes of the United States District Court Vol. 6, Page 536, Saturday, October 23, 1909.

[Title of Court and Cause.]

On this day came Mr. C. H. Olson, of counsel for libelee, and Mr. E. M. Watson, counsel for libellee, and the Court gave its decision herein granting the motion to amend the libel. Mr. Watson then moved that the costs in connection with this motion be taxed against the libellant, and it was so ordered.

[Minutes—October 29, 1909—Re Decision.]

PROCEEDINGS AT DECISION.

From the Minutes of the United States District Court, Vol. 6, Page 549, Friday, October 29, 1909.

[Title of Court and Cause.]

On this day came S. M. Ballou, Esq., on behalf of and representing the proctors for libellant herein, and E. M. Watson, Esq., one of the proctors for libellee, and the Court read its decision in the above-entitled cause, in favor of the libellant, whereupon Mr. Watson noted an exception which was allowed by the Court.

[Opinion.]

In the United States District Court for the Territory of Hawaii.

October A. D. 1909 Term.

No. 71.

PACIFIC MAIL STEAMSHIP COMPANY,
Libellant,

vs.

The "PACIFIC," etc.,
Libellee.

NEGATIVE PROPOSITION—BURDEN OF PROOF: Under the pleadings it became necessary to the case for libellant to prove the negative proposition that a cable attached to a buoy was not removed by the libellee, and, being without information,—

and the claimant from the nature of the case being in possesion of full information on the subject, it was held that the burden of proof was on the claimant to disprove the proposition.

WEIGHT OF TESTIMONY—DIAGRAM: A diagram drawn by a witness to illustrate his testimony is entitled to more weight,—other things being equal, than a diagram by counsel and accepted by a witness.

NEGLIGENCE FROM SUNKEN CABLE—LIABILITY: One placing cables at or near the bottom of waters used for navigation, so that they obstruct navigation, is liable for such damages as may arise thereby to vessels navigating such waters.

CONTRIBUTORY NEGLIGENCE — RESPONSIBILITY OF LIBELLANT: If the libellant, by his negligence, increased the amount of injury he received, the libellee cannot be held liable for such additional injury, although responsible for the injuries resulting from the first accident.

APPORTIONMENT—CONTRIBUTORY NEGLIGENCE: Where the injury caused by libellant's negligence can be separated from that caused by libellee, apportionment must be made and the libellee held liable only for the portion of the total injury caused by its negligence.

SAME: Where, in the case of contributory negligence, the proportion of damages caused thereby can be definitely ascertained, and is more or less than one-half of the total damages,—in this case less,—the decree should be in accordance

therewith instead of following the general rule of admiralty in such cases of relieving the libellee of one-half of the damages.

IN ADMIRALTY: Libel in rem for damages for injuries to the Steamship "Siberia."

Messrs. KINNEY, McCLANAHAN & COOPER, Proctors for Libellant.

Mr. NATHAN H. FRANK, Mr. E. M. WATSON, and Messrs. HOLMES, STANLEY & OLSON, Proctors for the Claimant.

The Pacific Mail Steamship Company, a corporation, brought this libel against the "Pacific,"—described as an ocean-going steam dredge, an American vessel of about eight hundred tons gross burden, and complains substantially as follows:

That on the 10th day of November, 1905, "the libellant's steamship 'Siberia,' a twin-screw American vessel of about twelve thousand tons gross burden, in good condition and well-manned and provided," was maneuvering with the assistance of a tug-boat in the harbor of Honolulu of the Territory of Hawaii, preparatory to leaving such harbor under a licensed pilot on its regular voyage to the port of Yokohama, and, while so maneuvering, a heavy wire cable and anchor chain lying on or near the bottom of the harbor fouled her starboard propeller, shaft and shaft sleeve, in such a way as to endanger and cause her great damage, and that such fouling was not caused or brought on by any carelessness or want of skill or precaution on the part of her officers and pilot; that the "Siberia" then, because of the difficulty of maneuvering with only one propeller in use

in a harbor of the size of the port of Honolulu, and of the shallowness of the water therein, and of the danger of anchoring in the condition she was in for the same reason and because of her size and the depth of water she was drawing proceeded with one propeller out of the harbor to deep water outside, where she anchored; that she promptly obtained the services of a diver, who succeeded in removing the anchor chain from the propeller and its shaft and disconnecting it from the wire cable to which it was attached, but found it impossible, under the circumstances, to unwind or remove the wire cable from the shaft or sleeve so that, after a delay of more than seven hours, the master decided to proceed on the voyage, leaving such wire cable around her shaft and sleeve; that, having arrived at the port of Yokohama on the 21st day of November, she employed divers to remove the said wire cable from the shaft and sleeve, which operation consumed three days and one night; that upon the arrival of said vessel on its return voyage, in the port of San Francisco, about the 12th day of January, 1906, she was placed in drydock and surveyed, and upon the examination by the surveyors, it was found necessary to remove the starboard propeller and propeller hub and to draw her starboard tail shaft in order to ascertain and repair the damage done thereto and to the vessel by said wire cable and anchor chain; that the necessary repairs were thereupon made; which docking, surveying and repairs consumed four days and four nights, amended to five days and four nights; that by such delay she was hindered in the prosecution of her business as a com-

mon carrier and delayed in starting on her next regular voyage; that all things done in the premises by the libellant and its officers, agents and employees were necessarily done in the proper and reasonable exercise of due precaution, skill and seamanship; that the wire cable and anchor chain which fouled her propeller as aforesaid was used by the libellee while engaged in dredging operations within the harbor of Honolulu, the said anchor chain being attached to a government buoy located in the said harbor, and that the said wire cable was fastened to such anchor chain, and, so fastened, was used by the libellee in its work of dredging as aforesaid, by means of which the position of the libellee was shifted from one point to another; that a few days prior to the said 10th day of November, the libellee changed her working position and in so doing she cast off the said wire cable fastened to the said anchor chain and caused the end of the section of said cable connected with the anchor chain of the said buoy to drop to the bottom of the harbor and lay there until the said 10th day of November, "a menace and obstruction to the free navigation thereof"; that on the said 10th day of November, neither the officers and crew of the said steamship "Siberia," nor the said pilot knew that the said wire cable was lying on the bottom of the said harbor, and there was no "mark of identification or warning attached" thereto; and the said wire cable was not lawfully within the lines of the said harbor; with allegations charging gross and culpable negligence and carelessness on the part of the libellee, her officers, crew, agents, servants and em-

ployees, and the absence of contributory negligence on the part of the libellant; and further alleging that the value of the said "Siberia" on the said 10th day of November was approximately two million dollars, and the value of her cargo approximately one million dollars, and that the value of the libellee and her machinery and equipment was one hundred thousand dollars; and asking for damages for the injuries and expenses, delays, etc., caused as aforesaid to the said "Siberia" by such fouling, in the sum of thirty thousand dollars.

The answer, as amended, denies "that the wire cable used by it . . . . or any other wire cable whatsoever belonging to or used by said dredge is the one which, with the anchor chain attached, fouled the said steamship 'Siberia's' starboard propeller, shaft and shaft sleeve as in said libel alleged, or otherwise or at all fouled said steamship 'Siberia's' starboard propeller, shaft and shaft sleeve," and admits that while engaged in dredging in the said harbor of Honolulu, at a place adjacent to the Marine Railway, immediately prior to the 10th day of November, 1905, she caused a large wire cable connected with her immediate rigging and machinery to be fastened to the anchor chain of a Government buoy located on the opposite side of the harbor channel from where she was then operating, for use in her work of dredging, which cable consisted of two or more separate sections securely shackled so as to make one continuous line to the said buoy; and, by Article 15 of the amended answer, "that it temporarily caused the end of the section of said cable im-

mediately connected with the said anchor chain of said buoy to drop to the bottom of said harbor, but alleges that the same was taken up and removed from said position and taken on board of said dredge before the said 10th day of November, 1905"; and generally and specifically denies all carelessness or negligence on the part of the officers and crew of the libellee.

The main issue of fact in this case is the question whether the wire cable which, attached to the chain of a buoy in the harbor, fouled the starboard propeller of the "Siberia," was the property of the claimant or in use by the libellee. If the court should find that such cable was not the property of the claimant, or a cable used by the libellee, that would dispose of the case in favor of the libellee.

A preliminary question comes up in relation to this issue. It is alleged in Articles 13, 14 and 15 of the libel that the libellee, having been operating in the vicinity of the Marine Railway "for a few days immediately prior to said 10th day of November, 1905," and being then connected with the anchor chain of the buoy in question by wire cable, she changed her working locality to a point toward the harbor entrance, but before doing so, cast off the said wire cable and "caused the end of the section of said cable immediately connected with said anchor chain of said buoy to drop to the bottom of said harbor, where it lay on said 10th day of November, A. D. 1905, a menace and obstruction to the free navigation thereof." The claimant, in Article 15 of the amended answer, admits that at the time alleged in the libel, the

dredge "temporarily caused the end of the section of the said cable immediately connected with said anchor chain of said buoy to drop to the bottom of the said harbor, but alleges that the same was taken up and removed from said position . . . before the said 10th day of November, 1905."

From these pleadings there develops the negative proposition that the libellee did not remove such cable from the bottom of the harbor and the chain of the buoy before the 10th day of November, the day of the accident.

The libellant is not in possession of information relating to the question of the removal of the cable from the buoy which the claimant alleges it placed there and removed therefrom a few days before the fouling of the "Siberia's" propeller, and claims that the fact that it is not in possession of such information, and the claimant, being obviously in possession of all of the information as to the removal of such cable from the buoy, if it was removed, the burden of proof is on the claimant to show that it was removed before the time of the accident.

The claimant, being in full possession of the facts, which are unknown to the libellant, must, according to the rule in such cases, assume the burden of proof, because if the negative proposition advanced by the libellant is not true, the claimant has the information by which it can disprove it, and it is vitally for its interest to do so, if it is the fact that such line was removed before the 10th day of November.

"When the means of proving the fact are equally within the control of each party, then the burden of

proof is upon the party averring the negative; but when the opposite party must, from the nature of the case, be in possession of full and plenary proof to disprove the negative averment, then it is manifestly just and reasonable that the party thus in the possession of the proof should be required to adduce it, or upon his failure to do so, we must presume it does not exist, which of itself establishes a negative." Great Western R. R. Co. v. Bacon, 30 Ill. 347; 83 Am. Dec. 200; Hoffschlaeger Co. v. Young Nap, 2 U. S. Dist. Ct. Haw., 97, 98-9; Clapp v. Town of Illington, 87 Hun. 524; 34 N. Y. Supp. 283, 285.

At the trial of the case, the buoy to which was attached the wire cable which, with the anchor chain of the buoy, fouled the starboard propeller of the "Siberia," was recognized as buoy No. 2; another buoy which was considerably referred to in the testimony, which was anchored close to the lighthouse and several hundred feet away from buoy No. 2, was recognized as buoy No. 1. They will be referred to in this decision as buoy 2 and buoy 1 respectively.

Considerable testimony was introduced of a circumstantial nature, bearing on the question whether the wire cable which was attached to buoy 2 and fouled the propeller of the "Siberia" was the cable of the libellee, which testimony pro and con was aimed to bring out the kind of the cable and the method by which it was attached to buoy 2. It appears from the evidence on both sides that the libellee was accustomed to attach its swinging cables to buoys by means of loops which were thrown over the buoys.

On the defense, the claimant introduced a witness by the name of Harry Spencer, whose evidence was taken by deposition in California It appears by this deposition that Spencer was an employee of the claimant and during the time the libellee was dredging in the harbor of Honolulu was employed thereon as mate of the libellee (Spencer, p. 7), up to and after the time of the accident, and that it was his duty as mate of the dredge to lay out the cable lines from both sides of the dredge (Id., p. 8), attaching them to some fixed object to be used for the purpose of swinging the dredge sideways during its work of dredging. This witness states that at the time the line from the dredge was attached to buoy 2, the dredge was working in a position "somewhere between the U. S. Naval Wharf No. 2 and the buoy No. 1" (Id. p. 12), and that she had at that time swinging lines on both buoys 1 and 2 and that it was his duty to place such lines (Id. p. 12) and also to take them up (Id. p. 13), and that he, with men to help him, removed them both (Id. p. 16),—the line from buoy 2 before the time of the accident of November 10th and the line attached to buoy 1 after the accident (Id. p. 17). Upon cross-examination he stated that he removed the line from buoy 2 one or two days before the accident (Id. p. 25). Upon being asked what fixed that time in his mind his answer was "because we needed it (the cable)" (Id. p. 26). Upon being pressed to state what made him remember particularly that he removed the line from buoy 2 before the accident and from buoy 1 after the accident, his only answer was

because they needed the wire (Id. pp. 37, 40), and in reference to buoy 2 he said the long one from buoy 2, which he described as being three or four hundred feet long (Id. p. 41). It appears from his and Matson's testimony that it was the custom of the dredge, upon changing her position from where she was working to another, to disconnect the swinging wires near the dredge, letting the parts attached to the buoys drop to the bottom of the harbor, buoying the ends with ropes attached to floating pieces of wood in order to conveniently pick them up, and that they would pick them up at an indefinite time afterwards, described by Spencer as two or three days or more (Id. pp. 42-43). He was unable to give the names of any of the men who were working with him in removing the lines from buoy 2 and buoy 1 (Id. pp. 38, 40), or the day,—either of the week or month, when he removed the lines from either buoy (Id. p. 40). On cross-examination he said that the dredge was alongside the lighthouse when she was using the line attached to buoy 2 (Id. p. 41). He was unable to fix the times of the removal of swinging lines which were attached to other fixed objects, as dolphins and piles, his only answer as to the removal of the cable from buoy 2 being that he remembered the removal of the line attached to buoy 2 because they needed the longest wire at that time.

His testimony is the only evidence introduced as to the removal of the swinging line from buoy 2 and therefore becomes of great importance in this case, for, if it is accepted, it decides the case in favor

of the libellee. In examining the evidence of Mr. Spencer, we find that he states that on proceeding from the dredge to buoy 2 for the purpose of fixing a line to it, they went out in a boat (Id. p. 16); that the depth of the water along which they laid the line was "one foot up to three or four or five, along like that" (Id. p. 16). The next question was "For how many feet?" Answer: "About three or four hundred feet," and that in going there the water was not always deep enough to float the boat; that they had to get out and walk and push the boat along, and this for a distance of three or four hundred feet (Id. p. 16). A witness introduced by the libellant, Edward Nelson, who was captain of the dredge during the period in question, and whose evidence was taken by deposition in California, stated that they began the use of the wire to buoy 2 on November 5th, and finished in the forenoon of November 6th. (Nelson, pp. 79, 80.)

The testimony of J. R. Slattery, the captain of the Corps of Engineers of the United States Army who was in charge of the improvements in Honolulu Harbor, and, at the time the work was being done by the dredger "Pacific" in such harbor, had supervision of that work, was taken by deposition before Federal Commissioner Hatch. In his testimony he referred to reports from November 3d to November 12th, made by inspectors appointed by him to superintend the dredging operations. Such reports were offered to be introduced in evidence, to be marked Libellant's Exhibits "B" to "I," for the purpose of showing the location of the dredge

in each of the days preceding the accident and on the day the accident occurred. These reports were objected to by counsel for the defendant but it does not appear on the record that such objection was acted upon. The reports referred to (Exhibits "B" to "I") have not been found and the Court has therefore been unable to refer to them. The location of the dredge, however, from November 3rd to November 10th is laid down on the map offered by libellant as Libellant's Exhibit 5 and introduced in evidence, by diagrams with appropriate memoranda. By this it appears that the position of the dredge on November 5th during the whole of the day was off the end of the Marine Railway a little to seaward, and that on November 6th, for the whole of the day, the position of the dredge was about halfway between the end of the Marine Railway and United States Naval Wharf No. 1, and on November 4th it was operating seaward of the Marine Railway inshore from the position on November 5th. A straight line from either the first or last mentioned positions, one of which would obviously be the position from which the line was taken to buoy 2, and which agrees with Spencer's testimony, to the position of buoy 2, as described by Captains Tripp, Lorenzen and Fuller, persons well acquainted with the harbor,—and in the case of Captains Tripp and Fuller, harbor masters,—would lie about in line with the bows of the "Mokulii" pointing toward the town.

The course mentioned by Spencer requiring him to go three or four hundred feet through shallow water would require a course around the stern of

the "Mokulii,"—an indirect course and obviously not the convenient one, as the other course across the bows of the "Mokulii" is the most direct and is through the deep waters of the harbor. Spencer's evidence on this point is rebutted by the testimony of Monaghan who operated the launch which towed the pontoon carrying the wires which were laid to buoy 2, and by a number of boys who were playing and bathing around the wharves that day and who went on the launch as visitors and for pleasure. If Spencer's statement of using a boat on that occasion may be construed to mean a rowboat in contradistinction from a motor boat, it is also rebutted by the above witnesses.

Captain Nelson testifies that the line from the dredge to the buoy was taken apart and the section attached to buoy 2 dropped,—which corresponds to the allegation of the amended answer, and the other part fastened to an anchor for swinging the dredge, but eventually taken up, as the anchor dragged (Nelson, pp. 90-91), and the line carried to the Kinau Wharf (Id. p. 91). When the line was taken apart, the section attached to buoy 2 was dropped to the bottom of the harbor. Spencer, in his testimony, makes no reference to this incident narrated by Captain Nelson, but confines his testimony on this point to the one statement that the line,—obviously meaning the whole line with the loop attached, except the end remaining attached to the dredger,—was taken up because they needed it, being a long line. It may be that his memory related to the using of the part of the line which Nelson says was

attached to an anchor, as he states they needed the line because it was a longer one for swinging the dredge. Taking Nelson's testimony on this point with Spencer's, it seems probable that the long wire mentioned by Spencer as "needed," was this part of the swinging wire to buoy 2 which Nelson says they separated from the remaining section attached to buoy 2, and fastened to an anchor as a new swinging line. There is no evidence in the whole case which refers to the removal of the section left attached to the buoy and dropped to the bottom of the harbor, when the line was taken apart,—no evidence showing that that section left attached to the buoy was ever picked up, except Spencer's statement that he removed the line because they needed to use the longer line, and his statement that he took it up himself (p. 17).

There is another matter of testimony going to Spencer's credibility, which I wish to refer to here. He repeatedly states in the most positive manner that he removed the swinging line attached to buoy 1 shortly after the accident, but not the next day (Spencer, pp. 49, 50), and that he, with men under him, pulled it up from the bottom of the harbor and took the loop apart (Id. p. 46), and that the loop was a loop made of a wire cable seventy-five to one hundred feet long doubled around and fastened to a long wire, and that that was about the average length of the wire he used in making a loop (Id., pp. 39-40). Now, we have the evidence of a large number of persons (F. W. Klebahn, Tr., pp. 261-2; C. S. Holloway, Tr. p. 277; Captain Fuller, Tr. p. 283;

James Lyle, Tr. pp. 360-1; Wm. Pololu, Tr. p. 299, and Keawe, Tr. pp. 340-1), who went out on the day after the accident to buoy 1 to examine a cable attached to its chain. The buoy had been pulled out of the water by the pile-driver by order of Captain Fuller, harbor-master, and the chain and part of the wire cable attached to it were on the deck of the pile-driver, the rest of the line running into the channel toward the channel wharf and there buoyed by a piece of wood. This line was left in that condition and was removed during the day by someone to the Court unknown, and yet Spencer states that he pulled up and removed the line attached to buoy 1 two or three days after the accident, a statement very difficult to accept in view of the above evidence. Moreover, the unanimous testimony of all these witnesses who testified on the subject was that the loop found on buoy 1 was a running noose.

Claimant's counsel have taken the ground in their brief that it is a mere presumption that the wire attached to the chain of buoy 1 was the wire laid there by the libellee. I consider the evidence preponderating in favor of the theory that it was the cable of the libellee. Spencer states that he placed a cable over buoy 1 before the accident and removed it after the accident. When the buoy was raised by the pile-driver into the air, a wire cable fastened to its anchor chain came up with it. This cable extended out into the harbor channel toward the channel wharf, or in that general direction, and was buoyed at the end by a rope to a stick of wood, which corresponds to claimant's evidence as to its custom

and manner of leaving its swinging lines after using them, and the direction the line from buoy 1 was left. If it was not the libellee's cable then the libellee's cable was on the chain at the time, if we accept Spencer's testimony, and could hardly have escaped observation. The suggestion of counsel for the claimant, both in regard to buoy 1 and buoy 2, that some unknown person may have, unknown to anyone, placed a loop with a line attached over these buoys, is so unlikely under the circumstances of this case, as to be entitled to little consideration.

Spencer's story of the course of his boat along shallow waters of the reef in which they had to get out and push the boat, is preposterous on the face of it, in view of facts developed in the course of the trial as to the location of the dredge, the "Mokulii" and buoy 2, and is wholly refuted by the evidence of witnesses whom there is no reason to doubt. The Court cannot, in view of the character of his testimony, give any weight to his story, standing alone, of the removal of the wire from buoy 2.

With this finding, the question of the responsibility for the cable which fouled the propeller of the "Siberia" comes down to circumstantial evidence. The testimony which develops this relates mainly to the kind of wire cable found on the propeller, shaft and shaft sleeve, and to the condition of the coil and the position, character and condition of the clamps and shackle, entangled in it.

A very strongly contested point in this circumstantial evidence was in relation to the character of the wire cable found on the "Siberia's" shaft and

that used by the libellee. It is settled by the introduction of Libellant's Exhibit 1 which is the piece of wire cable taken from the propeller by the witness Domei in Japan, that such cable was that known as right lay, which is a cable made of strands of twisted wire, seven strands in this case, the wires of which strands are twisted in the opposite direction from the direction in which the strands are twisted. Claimant introduced considerable testimony to show that up to some time after the day of the accident they used for swinging lines to the dredge nothing but right and left lay wire cable, which is a cable made of strands of twisted wires, every other strand being twisted in opposite directions; that is to say, holding such a piece of cable so that the strands run upwards to the right, the wires composing every other strand are twisted upwards to the right and those of the alternate strands are twisted upwards to the left.

Spencer swears that the wire used on buoy 2 was right and left lay and that they had no right lay wire on board the dredge and did not use any other kind at that time (Spencer, p. 18), and that all the wire that they used was most generally kept on the dredge and on the pontoons (Id. pp. 28-9) and that all that wire which they were using at that time was wire that was brought down on the dredge from San Francisco (Id. p. 53). He admits that after November 10th, 1905, perhaps a month later, they used right lay wire for swinging wires, saying that they used "lots of it" (Id. p. 45).

Captain Miller testified for the claimant that, be-

ing engaged in the wrecking business, he did work for the dredger company in removing obstacles and was on the dredge very often, almost every day during the whole of the time she was in Honolulu harbor (Tr. p. 148). He testifies that he noticed the wire which they were using because it was unusual, and that it attracted his attention and that it was right and left lay (Id. p. 148); that it was open to everyone to see this because they kept their wire at a storehouse near the railroad wharf (Id. p. 149). There are certain elements of weakness in Captain Miller's testimony.

First, on the direct examination he was shown a piece of new right and left lay wire and asked to state the lay; he first said it was right-hand lay wire. Upon being pressed by counsel he began again by the statement "that is a right-hand lay wire" (Id. p. 149), and, as he went on with his answer, he changed his statement and called it a right and left lay wire. His description is incorrect in that he said "the individual wires are twisted in a contrary way to which the strands are twisted, right hand, and the individual wires are twisted left hand," which is a good description of right lay wire, and then he goes on to say "that is what we call right and left-hand lay wire," and a few lines further along (p. 150) he was shown Libellant's Exhibit 1 and asked what kind of lay it was and he answered "That is a right-hand lay wire; the individual wires is laid the same way as the strand," which is a wrong description as the Court has stated above; that in a right-hand lay wire the individual wires

are laid in the opposite way from the strands. Another weakness in Captain Miller's testimony is that although he states he was familiar with the use of wires by the dredge all through her work and that she used the same kind of wires as mentioned, he qualifies this remark by saying he would not want to say, that she didn't use others (Id. p. 152). So that, if we accept Spencer's statement that after the accident perhaps a month, they used right lay wires for swinging wires and "lots of them," such use did not attract the attention of Captain Miller. Captain Miller admits his want of familiarity with right and left lay wires (Id. p. 148), and his testimony must be taken as simply based on an impression which he received when his attention was directed first to right and left lay wire as being a form new to him and after that time, having no reason to notice them, he failed to give them any particular attention and did not know when the dredge began to use right lay wire, and so if such wires were used before the 10th it would not necessarily have attracted his attention.

Matson, for the claimant, was asked on page 64 of his deposition, when the subject under consideration was the loop placed over buoy 2, "Do you remember what kind of wire it was that was used on that pennant, whether right lay or right and left lay?" He answered, "I didn't notice it, I didn't look over the wire." Then on being asked, "Do you know what kind of wire you were then using aboard the dredge?" he answered, "Yes, sir, we were using right and left."

Now, in connection with the incident already referred to—the raising of buoy 1 by the pile-driver and finding a wire cable attached to its chain, we find that the witnesses who were present and who have testified to other matters connected with such cable, with the exception of Keawe, did not notice the lay of the wire. Keawe testified that he was over forty years old, a carpenter, had worked for the Government nearly twenty years around the wharves, carpentering, going on scows and out to buoys, repairing of wharves and has had some experience with wires on shore and on the pile-driver (Tr. pp. 340, 355). He said the wire found on buoy 1 was like Libellant's Exhibit 9 (right lay), and not like Libellant's Exhibit 10 (right and left lay) (Id. p. 345), and on cross-examination, upon being asked what a right lay wire is, said, "There is one kind of wire has one lay that is different from another kind of wire which you can plainly see has a double lay, one going one way and the other going the other way" (Id. p. 354). Counsel for claimant has attempted to belittle this testimony of Keawe in regard to the lay of the wire found on buoy 1, speaking of Keawe as a "common laborer" (Claimant's Brief, p. 16). The evidence shows that he is a mechanic of long experience in government work, in which he has had much to do relating to the use of wire cables and general repairing work. No reason exists for throwing aside his positive testimony, especially considering his satisfactory description of the difference between right lay and right and left lay wire cables.

There is another attempt by the claimant's counsel to destroy the testimony of this witness and of Pololu, by trying to show from the records of their pay rolls that they did not and could not have been present on the occasion referred to. To show this, the witness Morse, foreman of the wharf department, was called by the claimant, he having been previously sworn as a witness for the libellant, and his time-book for the month of November was introduced in evidence. It appears from the testimony of this witness that he was accustomed to rather a loose practice in keeping his time-book. For instance, if a workman worked the smaller part of a day on one job and then was transferred for the rest of the day to another job, his pay for the smaller part of the day would sometimes be lumped in with his pay for rest of the day. His book shows Keawe is credited for the 11th of November on the account of the Sorenson wharf and he says in his testimony (p. 388), in answer to the question "Where is his pay for lifting it (the buoy) up; is that on the 14th of November"?—"Well, I don't remember exactly the day of the month; it was a couple of hours and was a short while only and I have got him booked down on the Sorenson wharf, charged to Sorenson's wharf." Then the question, "Is this credit to Keawe on November 14th, $2.50, does that include the lifting up of the buoy? A. May be that was lifting up the buoy, or examining the buoy" (Tr. p. 388). He says at the bottom of this page and at the top of the next page that both Pololu and Keawe were paid for the work of lifting up the buoy at the

time that Captain Fuller and others were out at the buoy. On that page he says, "If I worked on a job a couple of hours, got through and transferred my men to the next job, I charged it to the last job," and repeats the statement on page 390 in the following words: "If they worked a quarter of a day . . . . and if nothing more would be done, I would give them a quarter of a day for it, and sometimes if they have a small job and finish it up and go to another place I would charge it on the big job." There is a credit for both Pololu and Keawe on the 13th for a day's work and the witness says, on page 393, in answer to the question, "You know as a matter of fact that he did that work for the government and was paid for it"? "He did the work for the government and got pay for it. Keawe is credited to Sorenson's wharf for the 13th." It is, I think, apparent from Morse's testimony and from a reference to the book (Libellant's Exhibit "O"), that where a workman worked for the lesser part of a day at one place and then was transferred for the rest of the day to another place, for the work of which a separate account was kept, he would sometimes give him his full day's credit on the account for the work at the latter place. There is no testimony in the record which shakes the evidence as to the presence of both Pololu and Keawe on the occasion of the raising of buoy 1 by the pile-driver, and the discovery of the wire cable on its anchor chain.

Claimant's witnesses Spencer and Matson, both of whom say they were present when the line to buoy

2 was attached by throwing a loop over the buoy, testify that the loop was made by taking a cable from seventy-five to one hundred feet long, doubling it and fixing the ends to a shackle by means of eyes either made by splicing or by clamps, to the pin of which shackle was attached the line running to the dredge (Spencer, pp. 13-14; Matson, pp. 62-63). This form of loop was shown in Claimant's Exhibit 1, filed as Libellee's Exhibit "D," both witnesses approving this form of diagram. Mr. Lyle, witness for the libellant,—the diver who went out to the "Siberia" after she had left the harbor with her starboard propeller fouled, and who worked on it for some hours and finally detached the buoy chain which was entangled with the propeller by cutting a loop of wire cable holding this chain, both ends of which loop were entangled in a mass of cable wound tightly around the shaft or shaft sleeve or both,—testified that the piece of wire cable introduced in evidence as Libellant's Exhibit 1, which was a piece taken off the propeller shaft in Yokohama by Domei, a diver who afterwards was a witness in this court, was like the wire coiled around the shaft, except that he says the cable on the shaft when he was working at it was new, while the exhibit was rusty (Tr. p. 70); also that the clamp introduced in evidence as Libellant's Exhibit 3 and the shackle introduced in evidence as Exhibit 2, were similar to those which he found on the cable and chain (Tr. p. 68.) This wire loop was held by the chain four or five feet from the shaft. Wrapped in the wire which was around the shaft or shaft-sleeve, he found embedded

a shackle and two clamps so that only a small part of them was visible. It was the top part of the shackle which was visible, meaning, as I understand, the bow of the shackle, as he says it was the shoulders of both shackle and clamps that he saw (Tr. p. 68). He made no successful attempt to remove the wire cable and advised the captain that it was safe to proceed on his voyage with the wire remaining on the shaft (Id. p. 69), which was done. He says that after he had cut this wire and released the chain, about four feet on one side and five or five and a half on the other were the lengths of the projecting pieces (Id. pp. 69-70). He identifies the chain exhibited as Libellant's Exhibit 4 as looking like the chain which he loosed from the propeller (Id. p. 70). The clamps were tarred as if new but the shackle had no tar on it and there was no marine growth on either or on the wire cable (Id. p. 71). On cross-examination he swears that Exhibit 4 was a piece of the chain (Id. p. 82). He says, on cross-examination, that he reported "twenty-three parts of wire around there" (Id. p. 83), which I understand to mean the shaft. The aim of the defense was obviously to prove the loop found on the propeller shaft to be a short one, four or five feet long, so that it would appear unlikely that the wire cable was the cable of the dredge, as it had attempted to show that its cable was attached to the buoy by a loop made by a cable seventy-five to one hundred feet long with the ends brought together, which would make a loop of from thirty-seven to fifty feet long; which would, in the opinion of the defense, bring the clamps and

shackle so far back as not to fit the conditions which were discovered on the propeller.

I find from the evidence of Domei, the diver who removed the wire cable and afterwards testified in this case, that he found one shackle and one small clamp, although he speaks of them both as shackle (Domei, p. 15); that both of these were unattached to any wire although tightly wrapped by wire into the coils around the shaft (Id. p. 24). The second clamp which Lyle says he saw was not noticed by Domei. Domei says that the cable was wrapped around the shaft twenty times (Id. p. 11), and three times around the guard (Id. pp. 21-2), which corresponds to Lyle's "twenty-three parts of wire around there" (Tr. p. 83). The diameter of the shaft was 19½ inches, according to Hamilton, Chief Engineer of the "Siberia" (Hamilton, pp. 28-9), and the diameter of the shaft with the liner 21¾ inches, and that of the shaft-sleeve about 30 inches. On the most favorable calculation to the defense, the circumference of such shaft-sleeve must have been over seven feet, and twenty coils would consume 140 feet at least of wire cable, and the three coils around the guard something more. So that it is perfectly safe to assume, even allowing the loop contended for by the defense as shown by Libellee's Exhibit "D," that in these twenty-three coils, the whole of such loop with its clamps would be involved in the wire fouling the propeller shaft. As the shackle and the clamp were detached from any wire, it is impossible to say where they had been fastened to the wire coiled around the shaft sleeve. Domei says one sec-

tion of the wire protruded about three or four feet and he cut it off (Id. p. 11); also a shorter one protruded, both pieces protruding on the starboard side of the shaft and that they were about one foot apart (Id. p. 12). This protruding end, which he cut off, is the piece which has been introduced in evidence as Libellant's Exhibit 1 (Id. p. 15). He said that the large shackle introduced in evidence as Libellant's Exhibit 2 is the same shape and size as the one which he took from the propeller (Id. p. 16). He stated that there were three turns of the wire over the guard as well as twenty wraps around the shaft (Id. pp. 21-22). Domei guessed at the length of the long wire which he took off the shaft as between thirty and fifty feet (Id. p. 22). In view of the definite statement that such cable was wrapped twenty times around the shaft-sleeve and three times around the guard, this guess cannot be allowed very much weight. This wire was in two pieces, the short one about six feet long and the long one. The piece which was exhibited in court was part of the long one. The small shackle entangled in the wire was opened out.

The libellant has put in testimony from the witness Morse as to the method used by libellee in fastening swinging cables to fixed objects in Honolulu harbor and introduces Libellant's Exhibit 7 (Tr. p. 105), which is a diagram showing the method by which libellee fastened its cable to an anchor on the reef, which, as the diagram plainly shows, was in the nature of a running noose. The testimony connected with the cable on buoy 1 is circumstantial

but relevant in this connection. Several of the witnesses who examined this cable the day after the accident when it was pulled up by the pile-driver, agreed that the loop around the anchor chain was made by doubling up the end of a wire cable and fastening it with clamps,—two clamps in this case making what the witnesses sometimes called an eye; then a shackle is placed on the end of such loop or eye and over the body of the cable, making a running noose, which was thrown over the buoy. This testimony is illustrated by Libellant's Exhibits 12 and 13 and Libellee's Exhibits "L" and "N." Exhibit 13, drawn by Lyle, corresponds with Libellant's Exhibit 7 testified to by Morse (Tr. p. 362), and represents a small eye made by two clamps, to the end of which is attached the shackle through which the line runs, making a noose. Exhibits "L" and "N," made by Mr. Frank and endorsed by libellant's witnesses Pololu and Faria respectively on cross-examination, represent an eye made by bending the chain over and fastening the end to the cable by two clamps, but in this case the eye is made long and that part of the eye where the clamps are has been drawn through the shackle so that the noose is made of a double cable around the chain, instead of the single cable as in the testimony and exhibits of Morse and Lyle.

The difference between these two sets of diagrams as to the cable attached to buoy 1 is important, inasmuch as Mr. Lyle found only one wire cable around the anchor chain of the buoy entangled in the starboard propeller of the "Siberia" (Tr. p. 66), whereas

if the loop on buoy 2 was made according to the libellee's Exhibits "L" and "N,"—that is a long eye, and if the clamps making the eye had been pulled through or close to the shackle as shown by such exhibits in the case of buoy 1, then the circumstance of the wire on the propeller as Lyle found it would not correspond to such a condition, as in that case there would have been two wire cables around the anchor chain. The testimony, however, of Morse as to libellant's Exhibit 7, which illustrates a line of the dredge attached to an anchor on the reef, and Lyle's testimony as to the loop found on buoy 1, illustrated by Exhibit 13, drawn by himself (Tr. pp. 362, 367), in both of which the eye is made small and fastened by the clamps and no part of which was drawn through or close to the shackle, thus leaving but a single wire cable around the anchor in the one case and the anchor chain in the other, harmonizes with the single cable around the anchor chain fouling the propeller as found by Lyle. The Exhibits"L" and "N" were drawn by counsel for the claimant on the cross-examination of libellant's witnesses Pololu and Faria and were accepted by such witnesses (Tr. pp. 311, 324-5). Mr. Lyle drew his own diagram (Exhibit 13), which is a circumstance in favor of its accuracy and tends to outweigh a diagram made by counsel and accepted by a witness who, as in these cases, may be said to have been at a loss for words clearly to state what they wished to describe. However that may be, with the condition of the coil of wire around the propeller shaft-sleeve with the shackle and both clamps sepa-

rated from the wire cable by the great force of the propeller which produced the entanglement, it is not easy to lay down a specific proposition as to the kind of loop which was used, except that it was not a loop made of a large eye which had drawn so tight that two wire cables must have been around the anchor chain. Such a loop may have been used and the clamps creating it together with the shackle may have been caught in the coil before a sufficient strain was put on the wire cable to pull the noose tight; or it may be, which is more likely, that the loop was according to the description of the witnesses Morse and Lyle, shown by Libellant's Exhibits 7 and 13, with a small eye, and that the shackle and clamps became entangled in the coil before there had been strain enough to cause it to slide along the wire into a close loop around the anchor chain. If such is the case and the loop was about six feet in length, that would produce the condition found by Domei in which there was a piece of wire protruding three or four feet, which he cut off, being a piece of the long wire, and a shorter one protruding about one foot, the shorter one being found to be about six feet long when he removed it (Domei, p. 23). Either of these theories accounts reasonably for the condition of the coil as found by Lyle and Domei. It is more difficult to account for the condition of the coil on the theory of the loop described by Spencer and Matson, for, although the coil was long enough to take up the whole of such loop,—which would be from thirty-seven to fifty feet long,—yet the fact of a short end being found in the coil, strongly tends to

support the theory of the kind of loops already referred to and delineated in Libellant's Exhibits 7 and 13.

An attempt was made by the defense to show that the pin of the shackle used by the libellee in making the loop in question was held in place by a nut screwed on to the end of the pin, instead of by a key, which is a piece of soft iron passed through an aperture in the end of the pin, and bent to one side, or is a pin with a split end which is opened out when the pin is put through the shackle, thus holding it fast (Tr. pp. 223, 228). Spencer says (p. 14) that he believes the pin was fastened in the shackle by a nut screwed up and Matson corroborates this. This testimony, if accepted, tends to strengthen the defense somewhat, as obviously the pin of the shackle would be more easily displaced by the strain of the fouling of the propeller if fastened with a key than if fastened by a nut; but the Court has nothing before it by which it can gauge the power of the terrific strain put on the tangled mass of wire cable and anchor chain, and it moreover appears that the clamp which was found in the wrap by Domei (p. 24) had been disconnected from the cable although it had been fastened to it, if at all, by two nuts, and had also been opened out. The Court, as elsewhere suggested, is unable to rely to any great extent upon the statements of Spencer, and entertains also some want of confidence in Matson's testimony, yet, if their testimony on this point should be accepted, the conclusion of the Court on the main issue would not thereby be affected.

The evidence is preponderating under all the circumstances in favor of the contention that the wire which fouled the "Siberia's" propeller was the wire of the libellee. The argument of counsel for the claimant that someone else may have attached a wire to the buoy exactly like the wire of the dredge, with clamps and shackle exactly like those in use by the dredge, without anyone knowing it, is too remote a supposition to have weight in this case, especially as none of the witnesses were aware that any parties beside the libellee had ever used the method of attaching wire cables to buoys in the Honolulu harbor, by throwing a loop of such cable over a buoy.

Under the foregoing analysis of the evidence, I make the following findings:

I have already placed the burden of proof as to the removal of the wire cable of the libellee from buoy 2 before November 10th, 1905, on the claimant and find that such removal has not been shown, but the preponderance of evidence favors the proposition that it was not removed. I find that the wire cable found on the anchor chain of buoy 1, on the 11th of November, as testified to, was the cable of the libellee and that the wire of that cable was right lay wire; and, as a result of such finding, that the claimant has failed to prove that it did not use any wire for swinging lines before the 10th of November except right and left lay. I find that the wire cable fouling the starboard propeller of the "Siberia" was the wire cable of the libellee and used by it as a swinging line for working the dredge and attached

by it, as admitted, to such buoy several days before the 10th of November, and left by it on such buoy until the time of the accident.

These findings bring up the question of negligence for the consideration of the Court. In its decision on exceptions in this case, the Court cited the case of Inland & Seaboard Coasting Co. v. The Commodore, 40 Fed. Rep. 258, in which case a dredge had left an anchor used in mooring it at the bottom of the harbor and another vessel had fouled it and thereby received damage. The Court said: "The tort is the tort of the dredge; the negligence which caused the tort is the negligence of the dredge."

The authorities on this question of negligence are harmonious on the rule that where an anchor, a telegraph line or a mooring cable is left on the bottom of navigable waters used by ships in such a way that a ship moving in such waters, with a draft which is not too great for its movement, without touching bottom, is fouled by such a cable, telegraph line or anchor, it is negligence on the part of those placing it in such a position. In this case a charge is made that the libellee cast off its swinging line and caused the end of the section thereof connected with the buoy in question to drop to the bottom of the harbor and left it there, in which position it fouled the starboard propeller of the "Siberia." By the authorities it would appear that the negligence would have been the same if the cable had fouled the propeller of the "Siberia" under similar circumstances, when it was attached to the dredge and was being used by it, although it is admitted

that the dredging operations were legal and under authority, the point being that it is negligence for such cable to be so located that it can foul or damage a vessel properly navigating such waters.

In the case of Western Union Telegraph Co. v. Inman & I. Steamship Co., 59 Fed. Rep. 365, 367, the Court said:

"It being clear that the steamer was navigating, it is for the owner of the cables to show that they were not so maintained as to obstruct navigation."

The syllabus in this case contains the following:

"A vessel which, though touching bottom, forces her way by her own screw through the soft mud, is 'navigating'; and if, while so doing, her screw is fouled by, and breaks, a submarine cable, the burden is on the cable company to show that the cable was so constructed and maintained as 'not to obstruct navigation' as required by Rev. St. 5263; and this burden is not sustained when there is nothing to show the actual condition of the cable at the time, and it appears that it was originally laid near the end of an existing pier used by large ocean steamers, and over a mud bank, which they must necessarily plow through at certain states of the tide."

Section 5263 of the Revised Statutes gives permission to telegraph companies to lay and operate telegraph lines "over, under or across the navigable streams or waters of the United States; but such lines of telegraph shall be so constructed and maintained as not to obstruct the navigation of such streams and waters."

The case of Blanchard v. Western Union Tele-

graph Co., 60 N. Y. 510, says (p. 515):

"Navigation is injuriously interrupted when the channel of the river is made less safe, and ships and vessels are hindered, delayed or injured. Telegraph cables so laid or suspended in the water as to catch upon the keels, or some in contact with vessels navigating the stream, with such draught as the depth of water will permit, and which, but for such cables, would pass without difficulty or interruption, are improperly placed, and do injuriously interrupt navigation. . . . . A prima facie case was made against the defendant when the plaintiffs proved that the steamer, adapted, in all respects to the navigation of the river, and which had for years, and in safety, passed over this part of the stream almost daily, and requiring less depth of water than other vessels passing over at the same point without grounding, had—come in contact with the defendant's cable and received injury. The very fact of a collision and consequent injury unexplained, authorized the finding that the defendant had, by its cables, unlawfully obstructed the navigation of the river, and caused the damage."

Numerous other decisions support such rule of negligence.

The defense in this case has tried to show, through the evidence of Matson and Spencer, the former of whom fixed the position of the buoy in shallow water on the reef (Matson, p. 64), and the latter, who described the approach to the buoy in proceeding toward it in order to attach their swinging line to it, as through shallow water in which they had to get

out and wade and push their boat (Spencer, p. 16), in which testimony he was supported, though less circumstantially, by Matson, to show that the "Siberia" was guilty of negligence in backing into shallow water. This evidence, as has been shown above, is not worthy of credence, being wholly disproved by preponderating and reliable evidence to the contrary. The "Siberia" drew twenty-eight feet in its usual maneuver before leaving the harbor, backing to a position approaching buoy 2, which was of sufficient depth for its movement, and was fouled by this cable at a considerable distance from the buoy itself, which, in its proper position, was in twenty-four feet of water but had been moved out of such position obviously by the strain placed upon it by such cable when attached to the dredge.

The evidence does not show negligence on the part of the "Siberia" in its maneuver before leaving the harbor. The attempt to show that there was no officer on the stern of the ship during such maneuver failed, the witnesses who did not see such officer being overborne by either witnesses who did see him, and one of whom not only saw him but shouted and signalled to him in relation to the movement of buoy 2 toward the stern of the "Siberia" (Tr., pp. 327-8), showing that such fouling had taken place. I find that the fouling was due to the negligence of the libellee in placing its cable where it obstructed the navigation of the harbor by fouling with the propeller of the "Siberia."

The discussion of the question of a float on the end of the section of the line attached to buoy 2, as stated

by Captain Nelson, is unimportant in this connection. The only evidence on this point is that it was the custom of the libellee to attach such buoy, there being no special evidence that such was done in this case. Such buoys were handy pieces of wood and were for the purpose of floating the rope attached to the sunken cable by which the libelee might find such rope and recover such line. Such floats from the nature of the case would be inconspicuous at a distance and there is no evidence that they were placed there for the sake of a warning to ships.

In regard to the question of damages, it appears that the "Siberia," immediately on fouling with the cable attached to buoy 2, proceeded out of the harbor by means of her port propeller and with the assistance of the steam tug "Fearless," to an anchorage in the roadstead outside of such harbor, where she anchored and thereupon sent for a diver who, after some seven hours' work, succeeded in removing the chain of the buoy from her starboard propeller, in which work he had to cut a loop of the wire cable which held such chain, the rest of the cable being wrapped tightly around the propeller-shaft sleeve; that, thereupon, under the advice of the diver and with the ends of the wire cable so severed protruding, the ship proceeded on her voyage to Yokohama; that on the examination of the ship in drydock in San Francisco after the completion of such voyage, bits of wire obviously from the wire cable, part of which was wrapped around the propeller shaft-sleeve, had become involved in the bearings of the shaft and had entered such bearings

so that they were embedded therein, being found in the lignum vitae wood forming a part of such bearings, and that, in such position, these pieces of wire, from the revolutions of the shaft during the voyage had caused damage to the lignum vitae and to the shaft itself, so that the shaft subsided slightly in its bearings, causing a diminution of power. It also appears that the propeller blades, as seen by the diver in Yokohama (Domei, p. 35), and the witnesses who examined the vessel in drydock in San Francisco (Watson, pp. 8-9; Evers, p. 23; Stewart, p. 95; Gardner, p. 129), had received injuries on their edges; that such injuries were on their forward edges, all of them being affected but one more than the other two. The witness Lyle stated that while he was at work removing the chain from the propeller, he examined the upper blade and found nothing the matter with it (Tr., p. 76). From the evidence it would appear that these injuries were caused partly by the entanglement of the propeller with the anchor chain of the buoy, as pieces were taken out of the edge, which must have been caused, as witnesses Evers and Domei both testified, by striking a hard object. These injuries reached as far as four feet from the hub of the propeller (Evers, p. 37); other injuries, reaching about eighteen inches from the hub, which the witness Stewart speaks of as follows,—"I found that the leading edges of the three propeller-blades were chafed and flattened off" (Stewart, p. 95), would appear to have been caused by the longer of the two protruding ends of the cable left after the loop had been severed by the diver in

Honolulu, which would be struck by the propeller in its revolutions.

The question arises whether it was necessary for the "Siberia" to proceed outside of the harbor and anchor in a seaway at the time of the accident. The fee for the diver's services on that occasion was one thousand dollars (Tr., pp. 73, 360). His testimony is that his ordinary charge for work in still water is forty dollars a day (Id., p. 368). It is evident that he was justified in charging much more than the latter amount for his services in the open sea where there was a wave movement affecting and interfering with his work and probably some movement of the vessel. The harbor of Honolulu is enclosed between the land and the reef and is ordinarily perfectly smooth, except as to the ripples caused by the wind within this area. No necessity appears in the testimony for the movement which took place to the outside of the harbor. It was not an emergency under difficult and dangerous circumstances which would excuse a master or a pilot from ordinary cool judgment. The ship was within a few hundred feet from the city wharves and might have been taken there either by warping or the assistance of the tug, or both, in which case it seems obvious that the work done by the diver could have been done, the water being still, at his usual charge, and it appears to the Court that the libellant is not entitled to charge for the special cost of such services which were unnecessarily made outside of the harbor. The seven hours' work done would, so far as the evidence goes, represent a day's work; being done in the night-

time may have entitled the diver to extra pay, though there is no evidence before the Court on this point. It would seem that if the libellee is charged forty dollars for these services neither party would have any reason to complain.

This ruling as to the unnecessary action of the "Siberia" in leaving the harbor affects also its responsibility for such injuries as may have resulted by its continuance of the voyage without removing the wire coil from the propeller-shaft. It is clear that this might have been done without delaying the ship more than two or three days, if she had remained in the harbor. She took the responsibility of going on without this, and with a protruding end of the coil of wire interfering with the revolutions of the propeller, which, the evidence shows, caused some injury. She is therefore liable for such injury.

"Therefore, if it be true that the plaintiff, by negligence on his part, did increase the amount of damage and injury he received, then for that additional damage he cannot hold the company responsible, though they might be responsible for the first accident, and for the injury directly caused by it." Secord v. St. Paul M. & M. Ry. Co., 18 Fed. Rep. 221, 226; Wilmot v. Howard, 39 Vt. 447; Shearman & Redfield on Negligence, sec. 32, and cases cited in notes; Wharton on Negligence, sec. 868 et seq., and cases cited in notes; Stebbins v. R. R. Co., 54 Vt. 173; Sherman v. Fall River Iron Works Co., 84 Mass. 524, 526.

It is contended by counsel for the claimant that the damage to the blades of the propeller was entirely

caused on the trip from Honolulu to Yokohama by the projecting ends of the wire cable, which had been severed by the diver in Honolulu and left projecting, which were struck by the blades at every revolution. As intimated above, I am not able to find that this cause was responsible for more than the injuries which were found within about eighteen inches of the hub. Those beyond the eighteen inches, in which the edges of the blades were broken or toothed were apparently caused by the propeller striking the chain at the time of the fouling, or it may be by wrapping it around the blades with great force.

In addition to these were the injuries to the nuts fastening the propeller, and to what is called the propeller glands, which, in all probability, were caused both by the heavy strain of the chain or wire cable or both at the time of the fouling, and also by the revolutions of the propeller causing friction with the protruding ends of the wire cable. It is not possible to segregate exactly the injuries to the propeller blades, to the nuts for fastening them to the hub, which had to be renewed, and to the packing gland on the forward side of the propeller hub, which also had to be renewed, which were caused at the time of the fouling, from those caused on the voyage from Honolulu to Yokohama by the loose ends of the wire cable as testified to. I can do no better, under the evidence, than to attribute one-half of such injuries to each of the said causes respectively, according to the rule of damages in admiralty, and so find. The "Serapis," 49 Fed. Rep. 393, 397-8.

The claim is made by the defense that the other in-

juries which resulted to the "Siberia" after leaving Honolulu, in relation to the fouling of her propeller, were not the direct result of the fouling but of an intervening cause, to wit: the continuance of the voyage to the Orient and back to San Francisco; and cites Scheffer v. R. R. Co., 105 U. S. 249, Goodlander Mill Co. v. Standard Oil Co., 63 Fed. Rep. 400, and Jenks v. Wilbraham, 77 Mass. 142, in support of its contention. So far as the continuance of the voyage from Honolulu to Yokohama is concerned, the point is not well taken, inasmuch as there are are no facilities at Honolulu by means of which the injuries could have been examined and repaired. The "Siberia" was justified in proceeding with her freight and passengers to the next port on her schedule, and that was the course most favorable to the libellee in the matter of damages, as the other possible course,—her return to San Francisco for dockage and repairs, would have involved expenses in relation to conveyance of the mails, passengers and freight to their destination by another vessel, with the probable delays incident to such an enterprise, which must inevitably have been far beyond the comparatively minor expenses caused by her own continuance of the voyage. The negligence of the libellee was the efficient cause of all injuries resulting from the fouling, including those which necessarily occurred by reason of the continuance of the voyage, so far, at least, as to be within reach of dockage facilities, and it is liable therefor, except the damage caused by the loose ends of the wire cable, which might have been removed in Honolulu.

At this point the question arises as to the liability of the libellee for such injuries as were caused on the return trip from the Orient to San Francisco, for it appears by the testimony of Mr. Beaton, on cross-examination, who was the superintendent of the San Francisco drydock, that he thinks there were facilities for drydocking in China or Japan and that the "Siberia" had been drydocked there on a former trip. He is not sure about this but says, "I think there are, but I don't know. I am pretty sure she was on there. Certainly I don't know, but that is my impression" (Beaton, p. 125). Neither side carried this point further. The above testimony is, to my mind, hardly definite enough to justify the Court in holding the libellant to the responsibility for such injuries as may have resulted from the continuance of the voyage to San Francisco without going into drydock in "China or Japan."

Considerable evidence was drawn out concerning the necessity of docking the "Siberia" upon the completion of her voyage. It is perfectly clear to me that it was necessary, the information in the possession of the company in regard to the accident, the work of the divers in Honolulu and Yokohama and the diminished speed of the propeller, was sufficient to justify the placing of the ship in drydock for investigation, and in order to do what such investigation might show to be necessary. Stewart testifies (p. 97) that if all the wire had been removed from the shaft in Honolulu he should still have recommended drydocking. The injuries found justified such action and there is no evidence to show that

she was retained in drydock longer than was necessary. The repainting of the hull, which was proved to be necessary in order to protect the antifouling paint already on from injury because of exposure to the air, did not extend its continuance in the drydock.

Although the libel does not specifically refer to the expenses of the repainting as a basis for damages, it might be regarded as within the general allegation of injuries caused by the negligence of the libellee. It certainly was necessary to prevent injury in the drydock. Libellant's answer to the first interrogatory of the amended answer asking for the items making up the damages prayed for, contains no reference to a claim for repainting. Testimony was, however, introduced by libellant, without opposition, showing the expenses of such repainting, aggregating about $1350. According to the testimony of Railton,—the libellant's auditor, the "Siberia" was customarily docked for cleaning and painting every fourth voyage; and according to Hamilton, Chief Engineer of the "Siberia," she was usually docked every third voyage, and this was her thirteenth voyage and she had not been docked since her tenth voyage. In view of this evidence I do not find that the repainting is an equitable charge against the libellee. It may be that the "Siberia" would have been docked at that time in the regular course of things for cleaning and painting, if the other cause for docking had not arisen. Such action was due either then or at the end of the next voyage. The necessity of painting, which developed, was equally an opportunity, as the "Siberia" thereby escaped the usual dockage

charges which would range from $2,256.80 to $4,513.60. This point suggests a wide field of conjecture; for instance, to take one proposition, if the evidence had shown that the "Siberia" would have drydocked at such time for painting, would libellant be entitled to dockage fees for more than the surplus time for repairs?

The above finding, charging libellant with one-half of the expenses relating to the injuries to propeller-blades, to the nuts fastening them to the hub, and to the packing gland forward of the hub, raises the question whether the libellant should be held responsible for a part of the dockage fees and the demurrage on this account. I am of the opinion that it should be so held as a part of the results of its negligence. The case of The "Max Morris," 137 U. S. 14, 15, leaves the question open as to whether in such a case the decree should be for one-half or for a different proportion of the damages sustained. To award a proportion in accordance with the facts, which might be more or less than one-half, would seem to conform to justice and to an intelligent consideration of the ethics of such a question.

"The difficulty of separating the damage from each independent cause may be great, but it does not change the nature of the tortious act of the defendant or relieve him from liability: Little Schuylkill Nav. Co. v. Richard's Adm'r., 7 P. F. Smith, 146-7; Seely v. Alden, 11 Id. 302." Gould v. McKenna, 86 Pa. St. 297, 303.

"And whenever the injury produced by the plaintiff's negligence is capable of a distinct separation

and apportionment from that produced by the defendant, such an apportionment must be made, and the defendant held liable only for such a part of the total damage as his negligence produced." Beach, Contributory Negligence (3d ed.), Sec. 69, p. 109.

It is fortunate that in this case a copy of the bill for the repairs made to the "Siberia" in drydock of injuries which were the result of the fouling, is a part of the record, as Libellant's Exhibit 6. This bill, which is in considerable detail, shows the number of hours expended in repairing the injuries for which the libellant is found to be partially responsible, to be a little over one-fifth, or 22%, of the number of hours charged in making the total repairs. With this showing, I find the libellant should be held responsible for 11% of the dockage fees and 11% of the proper charge for delay in San Francisco.

The following is the bill of particulars furnished by libellant in answer to claimant's first interrogatory:

"a.	Machinery Repairs on 'Siberia'.....	$ 3442.00
b.	Surveys of 'Siberia' and Reports thereon	200.00
c.	Drydocking of 'Siberia' during time alleged in libel.....	15932.60
d.	Services of Diver and his Apparatus in Honolulu..	1000.00
e.	Services of Divers in Japan.....	125.00
f.	Delay of 'Siberia' in Honolulu.....	300.00
g.	Delay of 'Siberia' in San Francisco.	4000.00
	Total.....	$24999.69"

In accordance with the evidence and the above findings, this claim is modified as follows: The cost of repairs to the propeller-blades, propeller-hub and propeller-gland, as shown by divisions 1, 2, 10, 11, 12, 13 and 14 of Libellant's Exhibit 6, is $869.46. The item for total repairs,—$3442.09, is therefore diminished by one-half of $869.46, which is $434.73, leaving $3007.36 as the amount to be allowed for repairs.

The charge of $15,932.00 for drydocking, which is based on charges of 20 cents a ton for daytime and 10 cents a ton for nightime; the tonnage of the "Siberia" being 11,284, and $1.50 an hour for 18 hours' use of the air compressor, $1.50 an hour for 72 hours' use of the steam capstan, is diminished by 11% of that amount, which is $1752.59, leaving $14,-180.01 as the amount to be allowed for dockage.

The item for services of diver in Honolulu of $1000, is reduced to $40.00.

The item of $300 for seven hours' delay of "Siberia" in Honolulu is reduced to $250.45, in accordance with the finding on the next item.

The item of $4000 for delay in San Francisco is reduced to $3434.75, it being shown that her average net earnings for her previous twelve voyages was $^{8}58.68¾ a day, and that she had been delayed in starting on her next voyage after the docking and because of it, four days; and further reduced by $377.82, 11% of that amount, leaving $3056.93.

The claim of libellant by items, as modified and allowed by the Court is as follows:

a.	Machinery Repairs on "Siberia".....	$ 3007.36
b.	Surveys of "Siberia" and Reports thereon	200.00
c.	Drydocking of "Siberia".....	14180.01
d.	Services of Diver in Honolulu.....	40.00
e.	Services of Diver in Japan.....	125.00
f.	Delay of "Siberia" in Honolulu	250.45
g.	Delay of "Siberia" in San Francisco..	3056.93
	Total.....	$20859.75

A decree will be signed for this amount in favor of the libellant, with interest from March 12th, 1906, the date of the amendment of the libel on exceptions, with costs, except those accruing on the exceptions to the libel and on libellant's motion to amend the libel.

(Sgd.) SANFORD B. DOLE,
Judge, United States District Court.

October 29th, 1909.

[Endorsed]: No. 71. (Title of Court and Cause.) Decision. Filed Friday, October 29, 1909. A. E. Murphy, Clerk. By (Sgd.) A. A. Deas, Deputy Clerk.

Order Re Motion to Tax Costs.

From the Minutes of the United States District Court, Vol. 6, Page 608, Friday, December 3, 1909.

[Title of Court and Cause.]

On this day came Mr. S. M. Ballou and Mr. W. B. Lymer, of proctors for libellant, and Mr. E. M.

Watson, proctor for libellee herein, and the Court read its Decision on Motion to Tax Costs, instructing the clerk to amend the Bill of Costs in accordance with the findings of such Decision. Mr. Ballou noted an Exception to the Decision of the Court.

[Minutes—January 3, 1910—Re Decree.]

PROCEEDINGS UPON PRESENTATION OF DECREE.

From the Minutes of the United States District Court, Vol. 6, Page 635, Monday, January 3, 1910.

[Title of Court and Cause.]

On this day came Mr. S. M. Ballou, of proctors for libellant, and Mr. C. H. Olson, one of the proctors for libellee and claimant herein, and Mr. Ballou presented to the Court for signature a Decree in favor of libellant. Thereupon Mr. Olson objected to said Decree in the form presented by Mr. Ballou, whereupon, after due argument by respective counsel the Court stated that it would sign the decree after the same had been modified to provide for interest at the rate of 8% from the 12th day of March, 1906, to date, upon the amount allowed, and at the rate of 6% from and after the date of the decree, to which ruling of the Court Mr. Olson noted an exception.

[Notice of Presentation of Form of Decree.]

In the United States District Court for the Territory of Hawaii.

IN ADMIRALTY—IN REM.

PACIFIC MAIL STEAMSHIP COMPANY,
Libellant,

vs.

The Dredge "PACIFIC,"
Libellee.

NORTH AMERICAN DREDGING COMPANY,
Claimant.

To E. M. Watson and Holmes, Stanley & Olson, Attorneys for the Claimant.

Please take notice that we shall present the annexed decree to Honorable S. B. Dole, Judge of the United States District Court of the Territory of Hawaii, on Tuesday, December 28, 1909, at 9:30 A. M., and ask that the same be signed.

(Sgd.) KINNEY, BALLOU, PROSSER & ANDERSON,

Proctors for Pacific Mail Steamship Company, Libellant.

[Endorsed]: No. 71. (Title of Court and Cause.) Notice of Presentation of Decree. Filed Jan. 3, 1910. A. E. Murphy, Clerk. By (Sgd.) A. A. Deas, Deputy Clerk.

In the United States District Court for the Territory of Hawaii.

IN ADMIRALTY—IN REM.

PACIFIC MAIL STEAMSHIP COMPANY,
Libellant,

vs.

The Dredge "PACIFIC,"
Libellee.

NORTH AMERICAN DREDGING COMPANY,
Claimant.

Decree.

This cause coming on to be heard on the pleadings and proofs adduced by the respective parties, and having been argued and submitted and due deliberation having been had,

It is now ordered, adjudged and decreed by the Court that the libellant herein recover against the North American Dredging Company, claimant herein, the sum of $20,859.75, together with interest thereon at the rate of eight per cent (8%) per annum from the 12th day of March, 1906, to date, amounting to $6,359.90, and costs taxed at $941.12, making a total of $28,160.77, and that said claimant pay to said libellant the said sum of $28,160.77, together with interest thereon at the rate of six per cent (6%) per annum from the date of this decree until the same is satisfied.

It is further ordered, adjudged and decreed that unless this decree be satisfied or an appeal be taken

from it within the time limited and prescribed by law and the rules and practice of this Court (after notice of this decree to the local proctors for the claimant herein), that the stipulation for value on the part of the Claimant of the Dredge "Pacific" cause the engagement of its said stipulation to be performed, or show cause within four (4) days thereafter why execution should not issue against it, its goods, chattels and lands for the satisfaction of this decree according to its stipulation.

Dated: Honolulu, January 3, A. D. 1910.

(Sgd.) SANFORD B. DOLE,

Judge of the United States District Court for the Territory of Hawaii.

[Endorsed]: No. 71. (Title of Court and Cause.) Decree. Entered in J. & D. Book 2, at page 31. Filed Jan. 3, 1910. A. E. Murphy, Clerk. By (Sgd.) A. A. Deas, Deputy Clerk.

In the District Court of the United States for the Territory of Hawaii.

IN ADMIRALTY—No. 71.

PACIFIC MAIL STEAMSHIP COMPANY,
Libellant,

vs.

The Dredge "PACIFIC,"
Libellee.

NORTH AMERICAN DREDGING COMPANY,
Claimant.

Order [Fixing Time to Enter an Appeal].

It is hereby ordered that the above-named libellee and claimant may have to and including Tuesday, the 18th day of January, 1910, within which to enter an appeal to the Circuit Court of Appeals for the Ninth Circuit from the decree heretofore entered in the above-entitled cause, within which time the said decree shall not be executed.

Dated, Honolulu, T. H., January 12, 1910.

(Sgd.) S. B. DOLE,
Judge of the District Court of the United States for the Territory of Hawaii.

It is hereby stipulated and agreed by the undersigned Proctors for the above-named libellant that the foregoing order may be made and entered in the above-entitled cause.

January 12, 1910.

(Sgd.) KINNEY, BALLOU, PROSSER & ANDERSON,
Proctors for the above-named Libellant.

[Endorsed]: No. 71. (Title of Court and Cause.) Order. Filed January 12, 1910. A. E. Murphy, Clerk. By (Sgd.) A. A. Deas, Deputy Clerk.

In the District Court of the United States for the Territory of Hawaii.

IN ADMIRALTY—No. 71.

PACIFIC MAIL STEAMSHIP COMPANY,
Libellant,

vs.

The Dredge "PACIFIC,"
Libellee.

NORTH AMERICAN DREDGING COMPANY,
Claimant.

Notice of Appeal.

To the Pacific Mail Steamship Company, Libellant in the Above-entitled Cause, and to Messrs. Kinney, Ballou, Prosser & Anderson, Its Proctors:

You and each of you are hereby notified that the Dredge "Pacific," the libellee in the above-entitled cause, and the North American Dredging Company, claimant in said cause, intend to and do hereby appeal to the United States Circuit Court of Appeals for the Ninth Circuit from the final decree of the District Court of the United States for the Territory of Hawaii, made and entered in said cause on the 3d day of January, 1910; and you are hereby further notified that the said libellee and claimant intend to introduce new proofs in said appeal.

Honolulu, T. H., January 18th, 1910.

(Sgd.) HOLMES, STANLEY & OLSON,
Proctors for the Dredge "Pacific," Libellee, and North American Dredging Company, Claimant.

Service upon the undersigned of a copy of the foregoing Notice of Appeal this 18th day of January, 1910, is hereby admitted.

(Sgd.) KINNEY, BALLOU, PROSSER & ANDERSON,

Proctors for Pacific Mail S. S. Co., Libellant.

[Endorsed]: No. 71. (Title of Court and Cause.) Notice of Appeal. Filed January 18th, 1910. A. E. Murphy, Clerk. By (Sgd.) F. L. Davis, Deputy Clerk.

In the District Court of the United States for the Territory of Hawaii.

IN ADMIRALTY—No. 71.

PACIFIC MAIL STEAMSHIP COMPANY,
Libellant,

vs.

The Dredge "PACIFIC,"
Libellee.

NORTH AMERICAN DREDGING COMPANY,
Claimant.

Order [Fixing Time to File Bond].

It is hereby ordered that the above-named libellee and claimant may have to and including Friday the 28th day of January, 1910, within which to file a proper cost and supersedeas bond in the above-entitled cause, within which time the decree made and entered in said cause shall not be executed.

Dated Honolulu, T. H., January 18th, 1910.

(Sgd.) S. B. DOLE,

Judge of the District Court of the United States for the Territory of Hawaii.

[Endorsed]: No. 71. (Title of Court and Cause.) Order. Filed January 18th, 1910. (Sgd.) A. E. Murphy, Clerk.

In the District Court of the United States for the Territory of Hawaii.

IN ADMIRALTY—No. 71.

PACIFIC MAIL STEAMSHIP COMPANY,
Libellant,

vs.

The Dredge "PACIFIC,"
Libellee.

NORTH AMERICAN DREDGING COMPANY,
Claimant.

Order [Extending Time to File Bond].

It is hereby ordered that the above-named libellee and claimant may have to and including Saturday, the 29th day of January, 1910, within which to file a proper cost and supersedeas bond on appeal in the above-entitled cause, within which time the decree made and entered in said cause shall not be enforced.

Dated, Honolulu, T. H., January 28, 1910.

(Sgd.) S. B. DOLE,
Judge of the District Court of the United States for the Territory of Hawaii.

O. K.—K. B. P. & A.

[Endorsed]: No. 71. (Title of Court and Cause.) Order. Filed Jan. 28, 1910. A. E. Murphy, Clerk. By (Sgd.) A. A. Deas, Deputy Clerk.

[Order Approving Amount and Sufficiency of Bond.]

From the Minutes of the United States District Court, Vol. 6, Page 659, Saturday, January 29, 1910.

At Chambers.

[Title of Court and Cause.]

On this day came Mr. C. H. Olson, of proctors for libellee herein, and presented to the Judge sitting in Chambers, for approval, a Bond on Appeal in this cause, whereupon, after due hearing, the following order was signed by the Judge: "The amount and sufficiency of the within and foregoing bond, in addition to the bond dated March 27th, 1907, and approved the same day, from the North American Dredging Company, as principal and the United States Fidelity and Guaranty Co., as surety, to E. R. Hendry, Marshal of the United States for the Territory of Hawaii, now in the custody of this Court and on file in the above-entitled cause, is hereby approved this 29th day of January, 1910, and the same may operate as a stay of execution of the Decree in said cause pending the appeal heretofore taken therein to the United States Circuit Court of Appeals for the Ninth Circuit."

[Bond.]

In the District Court of the United States, in and for the District and Territory of Hawaii.

IN ADMIRALTY.

PACIFIC MAIL STEAMSHIP COMPANY (a Corporation),

Libellant,

vs.

The "PACIFIC,"

Libellee.

NORTH AMERICAN DREDGING CO. (a Corporation),

Claimant.

Know All Men By These Presents: That the North American Dredging Co., a corporation, organized under the laws of the State of Nevada, having its principal place of business in the City and County of San Francisco, in said State, claimant in the above-entitled cause, as principal, and American Surety Company of New York, a corporation, as surety, are held and firmly bound unto the Pacific Mail Steamship Co., libellant herein, in the sum of Five Thousand Two Hundred and Fifty (5,250) Dollars, to be paid to the aforesaid Pacific Mail Steamship Co., its successors and assigns, for which payment well and truly to be made, we bind ourselves, and each of our successors and assigns, jointly and severally, firmly by these present.

Sealed with our seals and dated this 22d day of January, Nineteen Hundred and Ten (1910).

Whereas, the above-named principal has appealed to the United States Circuit Court of Appeals for the Ninth Circuit from the final decree of the said District Court in the above-entitled cause; and

Whereas, the above-named appellant desires to stay the execution of the decree of the said District Court in the above-entitled cause pending said appeal; and

Whereas, the Judge of said District Court has ordered that the said appellant shall give a bond to stay the said execution of said decree in the further sum of Five Thousand (5,000) Dollars;

Now, therefore, the condition of the above obligation is such, that if the said appellant shall prosecute its appeal to effect, and pay the costs if said appeal be not sustained, and shall further abide by and perform whatever decree may be rendered by said Circuit Court of Appeals in said cause, or on the mandate of said Circuit Court of Appeals by the Court below, then this obligation to be void; otherwise to remain in full force and effect.

NORTH AMERICAN DREDGING CO.,
By (Sgd.) R. A. PERRY, [Seal]
Vice-President and General Manager.

AMERICAN SURETY COMPANY OF NEW YORK,
(Sgd.) BRANTLEY W. DOBBINS.
[Seal] Resident Vice-President.
Attest: (Sgd.) HAROLD M. PARSONS,
Resident Assistant Secretary.

State of California,
City and County of San Francisco,—ss.

On this 22d day of January, in the year one thousand nine hundred and ten, before me, John McCallan, a Notary Public in and for said City and County, State aforesaid, residing therein, duly commissioned and sworn, personally appeared Brantley W. Dobbins, and Harold M. Parsons known to me to be the Resident Vice-President and Resident Assistant Secretary respectively of the American Surety Company of New York, the corporation described in and that executed the within and foregoing instrument, and known to me to be the persons who executed the said instrument on behalf of the said corporation, and they both duly acknowledged to me that such corporation executed the same.

In witness whereof, I have hereunto set my hand and affixed my official seal, at my office in the said City and County of San Francisco, the day and year in this certificate first above written.

[Seal] (Sgd.) JOHN McCALLAN,
Notary Public in and for the City and County of San Francisco, State of California.

My commission expires April 12, 1913.

State of California,
City and County of San Francisco,—ss.

On this 22d day of January, in the year one thousand nine hundred and ten, before me, Charles Edelman, a Notary Public in and for the City and County of San Francisco, personally appeared R. A. Perry,

known to me to be the Vice-President and General Manager of the corporation described in and that executed the within instrument, and also known to me to be the person who executed it on behalf of the corporation therein named, and he acknowledged to me that such corporation executed the same.

Witness my hand and official seal the day and year first above written.

[Seal] (Sgd.) CHARLES EDELMAN,
Notary Public in and for the City and County of San Francisco, State of California.

My commission expires April 9, 1910.

The amount and sufficiency of the within and foregoing bond, in addition to the bond dated March 27th, 1907, and approved the same day, from the North American Dredging Company, as principal, and the United States Fidelity and Guaranty Co., as surety, to E. R. Hendry, Marshal of the United States for the Territory of Hawaii, now in the custody of this Court and on file in the above-entitled cause, is hereby approved this 29th day of January, 1910, and the same may operate as a stay of execution of the Decree in said cause pending the appeal heretofore taken therein to the United States Circuit Court of Appeals for the Ninth Circuit.

(Sgd.) S. B. DOLE,
Judge of the United States District Court, Territory of Hawaii.

Form C 500. 500—3—'09.

Singular.

EXTRACT FROM THE RECORD BOOK OF THE EXECUTIVE COMMITTEE OF THE AMERICAN SURETY COMPANY OF NEW YORK.

"A meeting of the Executive Committee of the AMERICAN SURETY COMPANY OF NEW YORK was held on the 22d day of June, 1909.

"The following resolution was adopted:

"RESOLVED, that BRANTLEY W. DOBBINS, of San Francisco, California, be and he is hereby constituted and appointed a Resident Vice-President of this Company at the town or city, aforesaid, with full power and authority to execute and deliver any and all surety bonds and undertakings, for or on behalf of this Company, in its busines and in accordance with its charter; such bonds and undertakings to have in every instance, however, the seal of this Company affixed thereto, and to be attested by the signature of a Resident Assistant Secretary of this Company."

State of New York,
County of New York,—ss.

I, F. J. Parry, Assistant Secretary of the American Surety Company of New York, do hereby certify that I have compared the foregoing extracts and transcripts, from the Record Book of the Executive Committee of the American Surety Company of New York, with the original record of said Executive Committee, and that the same are correct

extracts and transcripts therefrom as they appear of record and are set forth and contained in said Record Book; and I further certify that I have compared the foregoing resolution with the original thereof, as recorded in the Minute Book of said Company, and do certify that the same is a correct and true transcript therefrom and of the whole of said original resolution; and that the said resolution has not been revoked or rescinded.

Given under my hand and the seal of the Company, at the City of New York, this 22d day of June, 1909.

[Seal] (Sgd.) F. J. PARRY,
Assistant Secretary.

Form C 502, 1M—7—'08.

Singular.

EXTRACT FROM THE RECORD BOOK OF THE EXECUTIVE COMMITTEE OF THE AMERICAN SURETY COMPANY OF NEW YORK.

"A meeting of the Executive Committee of the AMERICAN SURETY COMPANY OF NEW YORK was held on the 6th day of October, 1908.

* * * * * *

"The following resolution was adopted:

"RESOLVED, That HAROLD M. PARSONS, of San Francisco, California, be and he is hereby constituted and appointed a Resident Assistant Secretary of this Company at the town or city, aforesaid, with full power and authority to attest any and all surety bonds and undertakings, for or on behalf of this Company, in its business and in accordance

with its charter; such bonds and undertakings to have, in every instance, however, the seal of this Company affixed thereto, and to be executed on behalf of this Company by one of its Resident Vice-Presidents."

State of New York,
County of New York,—ss.

I, F. J. Parry, Assistant Secretary of the American Surety Company of New York, do hereby certify that I have compared the foregoing extracts and transcripts, from the Record Book of the Executive Committee of the American Surety Company of New York, with the original record of said Executive Committee, and that the same are correct extracts and transcripts therefrom as they appear of record and are set forth and contained in said Record Book; and I further certify that I have compared the foregoing resolution with the original thereof, as recorded in the Minute Book of said Company, and do certify that the same is a correct and true transcript therefrom, and of the whole of said original resolution; and that the said resolution has not been revoked or rescinded.

Given under my hand and the seal of the Company, at the City of New York, this 6th day of Oct., 1908.

[Seal] (Sgd.) F. J. PARRY,
Assistant Secretary.

[Endorsed]: No. 71. (Title of Court and Cause.) Bond on Appeal and Approval. Filed Jan. 29, 1910. A. E. Murphy, Clerk. By (Sgd.) A. A. Deas, Deputy Clerk.

[Notice of Filing of Bond, etc.]

In the District Court of the United States for the Territory of Hawaii.

IN ADMIRALTY—No. 71.

PACIFIC MAIL STEAMSHIP COMPANY,
Libellant,

vs.

The Dredge "PACIFIC,"
Libellee,

NORTH AMERICAN DREDGING COMPANY,
Claimant.

To Pacific Mail Steamship Company, the Above-named Libellant, and Messrs. Kinney, Ballou, Prosser & Anderson Its Proctors:

Please take notice that the above-named claimant has this 29th day of January, 1910, filed in the above-entitled cause and in the above-named court a bond for costs on the appeal heretofore taken by said claimant from the final decree of the District Court of the United States for the Teritory of Hawaii in the above entitled cause to the United States Circuit Court of Appeals for the Ninth Circuit, and to stay execution of the said decree pending said appeal, in the sum of $5,250.00, in which said bond the said claimant is principal and American Surety Company of New York, a corporation having its principal office in the City of New York, in the State of New York, is surety, and that the Honorable Sanford B. Dole, Judge of the District Court of the United

States, for the Territory of Hawaii, has approved the said bond and stayed the execution of the said decree pending the said appeal.

(Sgd.) HOLMES, STANLEY & OLSON,
Proctors for Claimant.

[Endorsed]: No. 71. (Title of Court and Cause.) Notice. Filed Jan. 29, 1910. A. E. Murphy, Clerk. By (Sgd.) A. A. Deas, Deputy Clerk.

Service of a copy of the within notice upon the undersigned this 29th day of January, 1910, is hereby admitted.

(Sgd.) KINNEY, BALLOU, PROSSER & ANDERSON,
Proctors for Libellant.

In the District Court of the United States for the Territory of Hawaii.

IN ADMIRALTY—No. 71.

PACIFIC MAIL STEAMSHIP COMPANY,
Libellant,

vs.

The Dredge "PACIFIC,"
Libellee,

NORTH AMERICAN DREDGING COMPANY,
Claimant.

Assignment of Errors.

Now comes the North American Dredging Company, the claimant in the above-entitled cause, appellant herein, and says that in the record opinions, decisions, decree and proceedings in the above-en-

titled matter in the above-entitled court, there is manifest and material error, and said claimant and appellant now makes, files and presents the following assignment of errors upon which it relies as follows, to wit:

1. That the Court erred in overruling appellant's exception to the libel of the libellant filed herein that the allegations of said libel did not disclose and admiralty or maritime lien upon the dredge "Pacific" whereupon an attachment should or could be founded.

2. That the Court erred in allowing in evidence the deposition of one Joseph Scott Hamilton, taken on February 27, 1907, over the objection of the claimant that a previous deposition of said John Scott Hamilton had been taken in said cause on June 22, 1906, which was unsuppressed and on file in said cause and on the taking of which the said John Scott Hamilton had been fully examined and cross-examined; that it did not appear that any newly discovered evidence was to be given by said John Scott Hamilton or that any leave of the Court was granted or obtained for the taking of said deposition on said February 27, 1907.

3. That the Court erred in allowing in evidence in connection with the deposition of said John Scott Hamilton, taken on February 27, 1907, the official log-book of the steamship "Siberia," over the objection of the claimant that the said log-book had not been properly identified by the said John Scott Hamilton and that it did not appear that the same was kept by the person required by law to keep it; that it

was not shown that the entries therein were made at the time required by law or that the signatures or initials appearing opposite the entries were made at the time required by law.

4. That the Court erred in allowing the libellant upon the close of the case of the claimant to call as witnesses and to introduce the testimony of Paul Schulte, Jimmie Thompson, George Cassidy, Ralph Harrub, P. J. Monaghan, C. J. Campbell; John A. Young, F. W. Klebahn, C. S. Holloway, Capt. Fuller Capt. Lorenzen, William Pololu, George H. Johnson, Keawe and J. A. Lyle over the objection of the claimant that the testimony of none of the said witnesses was admissible as evidence in rebuttal or otherwise.

5. That the Court erred in not admitting the testimony offered by the claimant of one W. P. Fennell for the purpose of impeaching the testimony of Keawe and W. Pololu, witnesses introduced for the libellant.

6. That the Court erred in admitting in evidence the testimony of one D. Domei, in response to the following question: "Assuming that that wire became wrapped around the shaft of the starboard propeller in Honolulu, in your opinion was there any change in its position brought about by the steamer's trip from here (Honolulu) to Yokahama?" that in the opinion of the said D. Domei the wire referred to in the question had not shifted, over the objection of the claimant to the said question that the witness had not been shown to have any qualification to tes-

tify in relation to the subject matter of the said question.

7. That the Court erred in holding and deciding that the burden of proof was upon the claimant to show that a certain cable admitted to have been placed by it at the bottom of the harbor of Honolulu was taken up and removed by the claimant before the accident to the steamship "Siberia" on the 10th day of November, 1905.

8. That the Court erred in holding and deciding that the removal by the claimant of a certain wire cable belonging to the claimant from that certain buoy referred to in the record herein as buoy No. 2, before the 10th day of November, 1905, had not been shown, and that the preponderance of the evidence favored the conclusion that it was not so removed.

9. That the Court erred in holding and deciding that the wire cable fouling the starboard propeller of the steamship "Siberia" on the 10th day of November, 1905, was the wire cable belonging to the dredge "Pacific," and used by it as a swinging line and attached by it to said buoy No. 2 several days before the 10th day of November, 1905, and was left by it on such buoy until the time of the accident.

10. That the Court erred in holding and deciding that the wire cable fouling the starboard propeller of the steamship "Siberia" was a wire cable belonging to the dredge "Pacific."

11. That the Court erred in holding and deciding that the fouling of the propeller of the steamship "Siberia" was due to the negligence of the claimant in placing its cable where it obstructed the naviga-

tion of the harbor by fouling with the steamship "Siberia" or otherwise.

12. That the Court erred in not holding and deciding that the damage to the blades of the propeller of the steamship "Siberia" was entirely caused on the trip from Honolulu to Yokohama by the projecting ends of the wire cable picked up by said propeller in the harbor of Honolulu, which ends had been severed by a diver in Honolulu and left projecting, and which were struck by the blades of the propeller during its revolutions; and in finding that this cause was not responsible for more than the injuries which were found within a distance of eighteen inches of the hub of the propeller or thereabouts.

13. That the Court erred in not holding and deciding that the damage to the blades of the propeller of the steamship "Siberia" was wholly due to the negligence of the libellant.

14. That the Court erred in holding and deciding that the injuries to the nuts fastening the propeller and the injuries to the propeller gland of the steamship "Siberia" were caused at the time of the fouling on the 10th day of November, 1905, by a chain or wire cable picked up by said propeller on said date.

15. That the Court erred in holding and deciding that one-half of the injuries to the propeller-blades to the nuts for fastening them to the hub, and to the propeller gland, were caused at the time of the accident, to wit, on the 10th day of November, 1905.

16. That the Court erred in not holding and deciding that the injuries which resulted to the steamship "Siberia," after leaving Honolulu, in relation

to the fouling of her propeller were not the direct results of the fouling, but of an intervening cause, to wit, the continuance of the voyage of the steamship "Siberia" to Yokohama and thence to San Francisco.

17. That the Court erred in holding and deciding that the steamship "Siberia" was justified in proceeding from the harbor of Honolulu to the next port on her schedule, and that the negligence of the claimant was the efficient cause of all injuries resulting from the fouling of her propeller, except that found by the Court to have been caused by the loose ends of the wire cable which might have been removed in Honolulu.

18. That the Court erred in not holding and deciding that the claimant was not responsible for such injuries as may have resulted from the continuance of the voyage from Honolulu to Yokohama and thence to San Francisco.

19. That the Court erred in holding and deciding that the evidence introduced upon the trial of the cause was insufficient to show that there were facilities for placing the steamship "Siberia" in drydock in China or Japan before continuing her voyage to San Francisco.

20. That the Court erred in not holding and deciding that the burden of proof was upon the libellant to establish what proportion of the expenses of drydocking the steamship "Siberia" in San Francisco was caused by the damage due to the negligence, if any, of the claimant.

21. That the Court erred in not holding and

deciding that the libellant had failed to establish what proportion of the total damage was due to the negligence, if any, of the claimant.

22. That the Court erred in holding and deciding that the claimant was liable to the libellant in the sum of $3,007.36 or any sum for machinery repairs on the steamship "Siberia."

23. That the Court erred in holding and deciding that the claimant was liable to the libellant in the sum of $200, or any sum, for surveys held on the steamship "Siberia"; and reports thereon.

24. That the Court erred in holding and deciding that the claimant was liable to the libellant in the sum of $14,180.01, or any sum, for the drydocking of the steamship "Siberia."

25. That the Court erred in holding and deciding that the claimant was liable to the libellant in the sum of $40, or any sum, for services rendered to the steamship "Siberia" by a diver in Honolulu.

26. That the Court erred in holding and deciding that the claimant was liable to the libellant for the sum of $125, or any sum, for services rendered to the steamship "Siberia" by a diver in Japan.

27. That the Court erred in holding and deciding that the claimant was liable to the libellant in the sum of $250.45, or any sum, for delay of the steamship "Siberia" in Honolulu.

28. That the Court erred in holding and deciding that the claimant was liable to the libellant in the sum of $3,056.93, or any sum, for the delay of the steamship "Siberia" in San Francisco.

29. That the Court erred in awarding to the

libellant the sum of $20,859.75 with interest from March 12, 1906, or any sum.

30. That the award of $20,859.75 with interest from March 12, 1906, in favor of the libellant is not warranted by the evidence and was and is excessive and erroneous.

31. That the Court erred in not holding and deciding that the burden of proof was upon the libellant to establish what proportion of the entire damage caused to the steamship "Siberia" was caused by the negligence or default, if any, of the claimant.

32. That the Court erred in making and rendering the final decree in favor of the libellant for the sum of $20,859.75, together with interest from March 12, 1906, at eight per cent (8%) in the sum of $6,359.90, and costs in the sum of $941.12.

In order that the foregoing assignment of errors may be and appear of record, said claimant, appellant herein, files and presents the same to said Court, and prays such disposition be made thereof as in accordance with law and the statutes of the United States in such cases made and provided; and said claimant, appellant herein, prays a reversal of the above-mentioned decree heretofore made and entered by said Court and appealed from.

Dated at Honolulu, T. H., June 7th, 1910.

NORTH AMERICAN DREDGING COMPANY,

Said Claimant and Appellant.

By (Sgd.) E. M. WATSON,

(Sgd.) HOLMES, STANLEY & OLSON,

Its Proctors.

Due service of a copy of the within and foregoing assignment of errors upon the undersigned this 7th day of June, 1910, is hereby admitted.

(Sgd.) KINNEY, BALLOU, PROSSER & ANDERSON,

Proctors for Pacific Mail Steamship Company, Libellant and Appellee.

[Endorsed]: No. 71. (Title of Court and Cause.) Assignment of Errors. Filed June 7th, 1910, at 11 o'clock and 15 minutes A. M. A. E. Murphy, Clerk. By (Sgd.) A. A. Deas, Deputy Clerk.

In the District Court of the United States for the Territory of Hawaii.

IN ADMIRALTY—No. 71.

PACIFIC MAIL STEAMSHIP COMPANY, Libellant,

vs.

The Dredge "PACIFIC," Libellee,

NORTH AMERICAN DREDGING COMPANY, Claimant.

Affidavit Relative to Filing of Assignment of Errors.

United States of America,
Territory of Hawaii,—ss.

C. H. Olson, being first duly sworn, deposes and says: That he is a citizen of the United States, over the age of twenty-one years, and one of the proctors for the claimant in the above-entitled cause; that on the 7th day of June, 1910, at the hour of 11:15 o'clock

A. M., he filed in the office of the Clerk of the United States District Court for the Territory of Hawaii, with A. E. Murphy, Clerk of said Court, the said Claimant's Assignment of Errors, dated June 7th, 1910, on appeal to the United States Circuit Court of Appeals for the Ninth Circuit, from the Decree of the said District Court made and entered on the 3d day of January, 1910.

(Sgd.) C. H. OLSON.

Subscribed and sworn to before me this 7th day of June, A. D. 1910.

[Seal] (Sgd.) A. E. MURPHY,
Clerk of the United States District Court for the Territory of Hawaii.

[Endorsed]: No. 71. (Title of Court and Cause.) Affidavit Relative to Filing Assignment of Errors. Filed June 7, 1910. A. E. Murphy, Clerk. By (Sgd.) A. A. Deas, Deputy Clerk.

In the District Court of the United States in and for the District and Territory of Hawaii.

IN ADMIRALTY—IN REM.

PACIFIC MAIL STEAMSHIP COMPANY (a Corporation),

Libellant,

vs.

The "PACIFIC,"

Libellee,

NORTH AMERICAN DREDGING COMPANY,

Claimant.

Order to Withdraw Exhibits.

It is hereby ordered that the Clerk of this Court be permitted to withdraw from the files of this Court, for the purpose of sending to the clerk of the United States Circuit Court of Appeals for the Ninth Circuit, the following exhibits introduced in evidence in the above-entitled cause, the said above-entitled cause having been taken on appeal to the United States Circuit Court of Appeals for the Ninth Circuit, viz.:

Libellant's Exhibit "A" (before Commissioner) Map.
" " 1 (Wire).
" " 2 (Shackle).
" " 3 "
" " 4 (Chain).
" " 5 (Map).
" " 7 (Diagram).
" " 8 (Clamp).
" " 9 (Wire).
" " 10 (Wire).
" " 12 (Diagram).
" " 13 "

Libellee's Exhibit "A" (Diagram).
" " "B" (Map).
" " "C" "
" " "D" "
" " "E" (Map, blue-print).
" " "F" (Wire, right & left lay).
" " "G" (Diagram).
" " "H" (Photograph).

" " "I" (Diagram).
" " "K" "
" " "L" "
" " "M" "
" " "N" "
" " "O" (Time-book).
" " "X" (Pay-roll).

Dated, Honolulu, T. H., June 6th, 1910.

(Sgd.) S. B. DOLE,
Judge, U. S. District Court.

[Endorsed]: No. 71. (Title of Court and Cause.) Order to Withdraw Exhibits. Filed June 6th, 1910. A. E. Murphy, Clerk. By (Sgd.) A. A. Deas, Deputy Clerk.

In the District Court of the United States, in and for the Territory of Hawaii.

IN ADMIRALTY—No. 71.

PACIFIC MAIL STEAMSHIP COMPANY,
Libellant,

vs.

The Dredge "PACIFIC,"
Libellee,

NORTH AMERICAN DREDGING COMPANY,
Claimant.

Citation [Original].

United States of America,
Territory of Hawaii,—ss.

The President of the United States to Pacific Mail Steamship Company, Libellant Above Named,

and to Messrs. Kinney, Ballou, Prosser & Anderson, Its Proctors: Greeting:

You and each of you are hereby cited and admonished to be and appear in the United States Circuit Court of Appeals for the Ninth Circuit at the City and County of San Francisco, State of California, within thirty (30) days from and after the day this citation bears date pursuant to an appeal filed in the office of the Clerk of the United States District Court for the Territory of Hawaii, in the above-entitled cause, wherein North American Dredging Company, claimant, is appellant, and you are libellant and appellee, to show cause, if any there be, why the decree made, entered and rendered in the above-entitled cause on the 3d day of January, 1910, against the said North American Dredging Company, said claimant, as in said appeal mentioned, and thereby appealed from, should not be corrected and reversed, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable MELVILLE W. FULLER, Chief Justice of the Supreme Court of the United States, this 7th day of June, 1910.

S. B. DOLE,

Judge of the United States District Court for the Territory of Hawaii.

[Seal] Attest: A. E. MURPHY,
Clerk of said District Court.

Service of the within and foregoing citation is hereby accepted and admitted and receipt of a copy thereof acknowledged this 7th day of June, 1910.

KINNEY, BALLOU, PROSSER & ANDERSON,

Proctors for Pacific Mail Steamship Company, Libellant and Appellee.

[Endorsed]: No. 71. (Title of Court and Cause.) Citation. Filed June 7, 1910. A. E. Murphy, Clerk. By (Sgd.) A. A. Deas, Deputy Clerk.

[Certificate of Clerk U. S. District Court to Apostles on Appeal.]

In the United States District Court in and for the District and Territory of Hawaii.

United States of America,
Territory of Hawaii,—ss.

I, A. E. Murphy, Clerk of the United States District Court for the District and Territory of Hawaii, do hereby certify that the foregoing pages numbered from 1 to 319, inclusive, contained in volume 1, and the foregoing pages numbered from 320 to 673, inclusive, contained in volume 2, and the foregoing pages numbered from 674 to 1049, inclusive, contained in volume 3, is a true and complete transcript of the record and proceedings had in said Court in the case of The Pacific Mail Steamship Company, a corporation, Libellant, vs. The "Pacific," Libellee, North American Dredging Company, Claimant, as the same remains of record and on file in my office, and I further certify that I here-

to annex the original citation on appeal in said cause.

I further certify that I have forwarded the following Original Exhibits, viz: Libellant's Exhibit "A" (before commissioner), map; Libellant's Exhibit 1 (wire); Libellant's Exhibit 2 (shackle); Libellant's Exhibit 3 (shackle); Libellant's Exhibit 4 (chain); Libellant's Exhibit 5 (map); Libellant's Exhibit 7 (diagram); Libellant's Exhibit 8 (clamp); Libellant's Exhibit 9 (wire); Libellant's Exhibit 10 (wire); Libellant's Exhibit 12 (diagram); Libellant's Exhibit 13 (diagram); Libellee's Exhibit "A" (diagram); Libell*ant's* Exhibit "C" (diagram); Libellee's Exhibit "D" (diagram); Libellee's Exhibit "E" (map, blue-print); Libellee's Exhibit "F" (wire, right & left lay); Libellee's Exhibit "G" (diagram); Libellee's Exhibit "H" (photograph); Libellee's Exhibit "I" (diagram); Libellee's Exhibit "K" (diagram); Libellee's Exhibit "L" (diagram); Libellee's Exhibit "M" (diagram); Libellee's Exhibit "N" (diagram); Libellee's Exhibit "O" (Time-book); Libellee's Exhibit "X" (Pay-roll), detached from the record and proceedings.

I further certify that the cost of the foregoing Transcript of Record is $273.80, and that said amount was paid by appellant.

In testimony whereof I have hereunto set my hand and affixed the seal of this Court this 7th day of June, A. D. 1910.

[Seal] A. E. MURPHY,
Clerk.

[Endorsed]: No. 1866. United States Circuit Court of Appeals for the Ninth Circuit. The North American Dredging Company (a Corporation), Claimant of the Steam Dredge "Pacific," Her Engines, Machinery, Boilers, etc. (Libelee), Appellant, vs. The Pacific Mail Steamship Company (a Corporation), (Libelant), Appellee. Apostles. Upon Appeal from the United States District Court for the Territory of Hawaii.

Filed June 15, 1910.

F. D. MONCKTON,
Clerk.

By Meredith Sawyer,
Deputy Clerk.

Libelant's Exhibit No. 3.

SG. 75 B.

PACIFIC MAIL STEAMSHIP COMPANY.

S. S. ——— VOY. ——— AT ———

——————— 190——

PORT ENG.

5.04 P. M.	Stand by
12 " "	Half astern
14 " "	Stop
15 " "	Half ahead
17 " "	Full "
18 " "	Stop
20 " "	Full ahead
20-½	Stop.
22 " "	Half ahead
23 " "	Stop.
24 " "	Half ahead
25 " "	Stop
25-½	Full ahead
27 " "	Stop.
29 " " "	Half ahead
29-½	Stop
30 " "	Slow ahead
30-½	Stop
32 " "	Half astern
33 " "	Stop
35 " "	Slow ahead
36 " "	Stop
38 " "	Half astern
39 " "	Stop
40 " "	Half ahead

40-½ Stop
41 " " Half ahead
43 " " Stop
52 " " Half ahead
5.53 P. M. Stop
54 " " Half astern
55 " " Stop
56 " " Half astern
57 " " Stop
58 " " Ring off

SG. 75 B.

PAGE2

PACIFIC MAIL STEAMSHIP COMPANY.
S. S. "SIBERIA" VOY. 13. At HONOLULU.
NOVEMBER 10th, 1905.

STARBO. ENG.
5.04 P. M. Stand by
10 " " " Slow astern
11 " " Half astern
16 " " Stop
17 " " Full astern
19 " " Stop
21 " " Half astern
23 " " Full astern
27 " " Stop
58 " " Ring off

Copy of the official Log—Engineer's—of S. S. "Siberia" leaving Honolulu, Nov. 10th, '05.

(Sgd.) J. S. HAMILTON,
Chief Engineer.

(Sgd.) J. S. SMITH,
Commander.

[Endorsed]: (Title of Court and Cause.) Libellant Ex. "3" on Taking Deposition of J. S. Hamilton. Filed June 18, 1906. (Sgd.) W. B. Maling, Clerk & U. S. Comm.

No. 1866. U. S. Circuit Court of Appeals for the Ninth Circuit. Libellant's Exhibit "3" on taking of Deposition of J. S. Hamilton. Received Jun. 15, 1910. F. D. Monckton, Clerk.

Libelant's Exhibit No. 6.

Interest Will be Charged After Maturity at the Rate of One Per Cent Per Month.

TERMS ——

Payable in U. S. Gold Coin.

COPY.

San Francisco, January 26, 1906

Libelant's Exhibit 4, for Identification. (Sgd.) Jas. P. Brown.

S. S. "SIBERIA" & OWNERS.

Bought of

UNION IRON WORKS CO.

Marine Engineers, Steamship Builders.

Mining, Milling & Smelting Machinery, Steam, Air, Hydraulic & Electric Machinery, etc.,

Office & Works at Potrero.

Office o fMining Dept.,
Office of Mining Dept.,
222 MARKET STREET.

K–553–3745:

1.

Took three blades off starboard propeller hub.				
Machsts. Fitting	160 hrs.	.60	$96.00	
Machsts Helpers	95	.35	33.25	
Riggers	10	.45	4.50	
Riggers' helpers	60	.35	21.00	
Tug	3	2.00	6.00	$160.75

2.

Took starboard propeller hub off shaft.				
Machsts. Fitting	65 hrs.	.60	$ 39.00	
Machsts. Helpers	55	.35	19.25	
Riggers	8	.45	3.60	
Riggers' helpers	40	.35	14.00	
Wells Light	2	.25	.50	
Tug	3	2.00	6.00	
			$ 82.35	
5 –Gals. Coal oil		24	1.20	
72–Pine wedges		50 doz.	3.00	86.55

3.

Took coupling off inboard end of propeller shaft.				
Machsts. Fitting	865½ hrs.	.60	$519.30	
Machsts. helpers	536	.35	187.60	
Tug	10	2.00	20.00	
			$726.90	
Bolts	38#	.10	3.80	
Nuts	35¼	.15	5.29	
Washers	3½	.08	.28	736.27

4.

Removed one shaft bearing.				
Machsts. Fitting	15 hrs.	.60	9.00	
Machsts. Helpers	25½	.35	8.92	
			$ 17.92	
Bolts	10#	.10	1.00	18.92

Forward.....$1002.49

S. S. "SIBERIA" & OWNERS–2.

Forward				$1002.49
5.				
Hauled out starboard propeller shaft.				
Blacksmiths & Helpers	8 hrs.	1.25	$ 10.00	
Machsts. Fitting	370	.60	222.00	
Machsts. & Machs.	42	.80	33.60	
Machsts. Helpers	280	.35	98.00	
Riggers	100	.45	45.00	
Riggers' helpers	500	.35	175.00	
Carpenters	185	.55	101.75	
Locomotive	2	2.00	4.00	
Tug	21	2.00	42.00	
			$731.35	
Bar Steel	21½#	.03½	.74	
Rags	50	.04½	2.25	
Wire nails	14	.05	.70	
Red paint	35	.15	5.25	
1—Coil 3" Manila rope)				
1—Coil 4" Manila rope)	583	.18	104.94	
1—Gal. Red lead paint			1.75	
1688—Ft. Clear pine		.03½	59.08	
13—Ft. Sugar pine		.06	.78	906.84
6.				
Renewed lignum-vitae in starboard stern tube bearing.				
Blacksmiths & Helpers	14 hrs.	1.25	17.50	
Steam hammer	6	2.00	12.00	
Machsts. Fitting	140	.60	84.00	
Machsts. & Mach.	8	.80	6.40	
Machsts. & Machs. (large)	11	1.50	16.50	
Machsts. Helpers	220½	.35	77.17	
Riggers	10	.45	4.50	
Riggers' helpers	50	.35	17.50	
Carpenters	208½	.55	114.67	
Mill machines	22½	2.00	45.00	
Tug	19	2.00	38.00	
			$433.24	
Bar iron	100#	.03	3.00	
Class B bloom steel	307	.07½	23.02	
Channel	141	.04½	6.34	
Nuts	5½	.15	.82	
Hex. bronze	25½	.40	10.20	
Lignum-vitae	1156	.05½	63.58	540.20
7.				
Replaced starboard propeller shaft.				
Machsts. Fitting	125 hrs.	.60	75.00	
Machsts. helpers	110	.35	38.50	
Riggers	45	.45	20.25	
Riggers' helpers	205	.35	71.75	
Tug	10	2.00	20.00	225.50
Forward				$2675.03

S. S. "SIBERIA" & OWNERS–3.

			Forward.....	$2675.03

8.

Replaced one shaft bearing.

Machsts. Fitting.....	30½ hrs	.60	$ 18.30	
Machsts. helpers.....	41	.35	14.35	32.65

9.

Replaced coupling on inboard end of propeller shaft.

Machsts. fitting.....	110 hrs.	.60	$ 66.00	
Machsts helpers.....	115	.35	40.25	
Tug	3	2.00	6.00	112.25

10.

Replaced starboard propeller hub on shaft.

Machsts. Fitting.....	29 hrs.	.60	$ 17.40	
Machsts. helpers.....	31	.35	10.85	
Riggers	8	.45	3.60	
Riggers' helpers.....	40	.35	14.00	
Tug	2	2.00	4.00	
			$ 49.85	
N. S. ship rubber.....	1½#	.90	1.35	51.20

11.

Made eight brass nuts for bolts holding propeller blades on starboard hub.

Pattern Makers.....	24 hrs	.65	15.60	
Machsts. & Machs.....	29	.80	23.20	
			38.80	
Bronze castings.....	432#	.35	151.20	190.00

12.

Renewed packing gland on forward side of starboard propeller hub.

Pattern Makers.....	10 hrs.	.65	6.50	
Machsts. Fitting.....	15	.60	9.00	
Machsts. & Machs.....	33	.80	26.40	
Machsts. Helpers.....	15	.35	5.25	
			$ 47.15	
Brass castings.....	42#	.28	11.76	
Rd. Bronze.....	16½	.40	6.60	65.51
			Forward.....	$3126.64

S. S. "SIBERIA" & OWNERS—4.

Forward				$3126.64

13.

Turned off edges of three starboard propeller blades.

Blacksmiths & helpers	1 hr.	1.25	1.25	
Machsts. Fitting	10	.60	6.00	
Plateworkers	19	.45	8.55	
Air hammer	29	.80	23.20	
Riggers' helpers	35	.35	12.25	
Tug	2	2.00	4.00	55.25

14.

Replaced three blades on starboard propeller hub, and cemented over nuts at base of blades.

Machsts. Fitting	185 hrs	.60	111.00	
Machsts. helpers	137	.35	47.95	
Cementers	45	.45	20.25	
Riggers	10	.45	4.50	
Riggers' helpers	60	.35	21.00	
Tug	3	2.00	6.00	
			$ 210.70	
Red lead putty	270#	.15	40.50	
3—Bbls. Portland cement		3.00	9.00	260.20
Total				$3442.09

[Endorsed]: No. 71. (Title of Court and Cause.) Exhibit 6, Libellant's. Filed March 14th, 1907. Frank L. Hatch, Clerk. By A. E. Murphy, Deputy Clerk.

No. 1866. U. S. Circuit Court of Appeals, for the Ninth Circuit. Libellant's Exhibit "6." Received Jun. 15, 1910. F. D. Monckton, Clerk.

LIBELLANT'S EXHIBIT 7 (Evidence)

462 No. 71

United States District Court.
Territory of Hawaii

THE PACIFIC MAIL S. S. CO.

vs.

THE 'PACIFIC'

EXHIBIT 7 Libellants. Evidence ~~for identification~~
Filed MARCH 14th 1907
FRANK L. HATCH
Clerk
By H E MURPHY
Deputy Clerk

No 1866
U.S. CIRCUIT COURT OF APPEALS
FOR THE NINTH CIRCUIT
LIBELLANT'S EXHIBIT 7 (Evidence)
Filed JUN 1910
F.D. MONCKTON, Clerk

made by Mr McClanahan on examination of Libellants witness Morse [illegible] 05

Forward.....$3126.64

13.

Turned off edges of three starboard propeller blades.

Blacksmiths & helpers.....	1 hr.	1.25	1.25	
Machsts. Fitting.....	10	.60	6.00	
Plateworkers	19	.45	8.55	
Air hammer.....	29	.80	23.20	
Riggers' helpers.....	35	.35	12.25	
Tug	2	2.00	4.00	55.25

14.

Replaced three blades on starboard propeller hub, and cemented over nuts at base of blades.

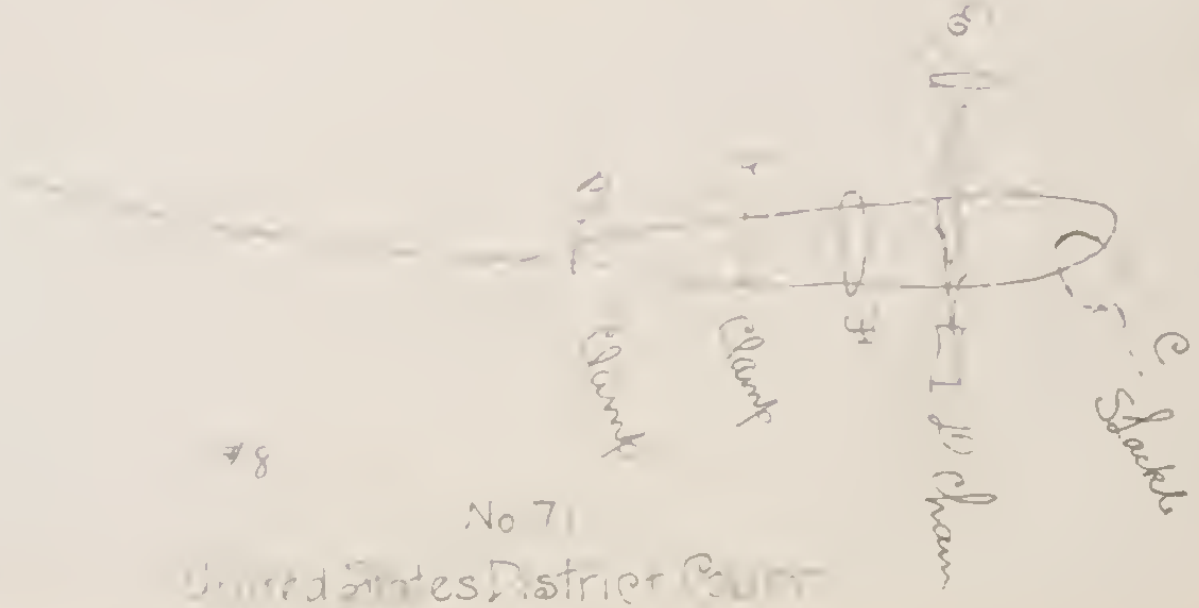
Machsts. Fitting.....185	hrs	.60	111.00	
Machsts. helpers.....137		.35	47.95	
Cementers	45	.45	20.25	
Riggers	10	.45	4.50	
Riggers' helpers.....	60	.35	21.00	
Tug	3	2.00	6.00	
			$ 210.70	
Red lead putty.....270	#	.15	40.50	
3—Bbls. Portland cement.....		3.00	9.00	260.20

Total.....$3442.09

[Endorsed]: No. 71. (Title of Court and Cause.) Exhibit 6, Libellant's. Filed March 14th, 1907. Frank L. Hatch, Clerk. By A. E. Murphy, Deputy Clerk.

No. 1866. U. S. Circuit Court of Appeals, for the Ninth Circuit. Libellant's Exhibit "6." Received Jun. 15, 1910. F. D. Monckton, Clerk.

LIBELLANT'S EXHIBIT 12.



#8

No 71

United States District Court
Territory of Hawaii

PACIFIC MAIL S S Co
vs
THE EDGE 'PACIFIC'

EXHIBIT 12 Libellants
Filed MARCH 22, 07
FRANK L HATCH Clerk
By G E MURPHY Deputy Clerk

No 1866
U S CIRCUIT COURT OF APPEALS
FOR THE NINTH CIRCUIT
LIBELLANTS EXHIBIT 12
Received JUN 15 [illegible]
F D MONCKTON Clerk

S. S. "SIBERIA" & OWNERS—4.

Forward.....$3126.64

13.

Turned off edges of three starboard propeller blades.

Blacksmiths & helpers.....	1 hr.	1.25	1.25	
Machsts. Fitting.....	10	.60	6.00	
Plateworkers	19	.45	8.55	
Air hammer.....	29	.80	23.20	
Riggers' helpers.....	35	.35	12.25	
Tug	2	2.00	4.00	55.25

14.

Replaced three blades on starboard propeller hub, and cemented over nuts at base of blades.

Machsts. Fitting.....185 hrs		.60	111.00	
Machsts. helpers.....137		.35	47.95	
Cementers	45	.45	20.25	
Riggers	10	.45	4.50	
Riggers' helpers.....	60	.35	21.00	
Tug	3	2.00	6.00	
			$ 210.70	
Red lead putty.....270#		.15	40.50	
3—Bbls. Portland cement.....		3.00	9.00	260.20

Total.....$3442.09

[Endorsed]: No. 71. (Title of Court and Cause.) Exhibit 6, Libellant's. Filed March 14th, 1907. Frank L. Hatch, Clerk. By A. E. Murphy, Deputy Clerk.

No. 1866. U. S. Circuit Court of Appeals, for the Ninth Circuit. Libellant's Exhibit "6." Received Jun. 15, 1910. F. D. Monckton, Clerk.

— LIBELLANT'S EXHIBIT #13 —

#82 No. 71

United States District Court
Territory of Hawaii.

PACIFIC MAIL S.S. Co.

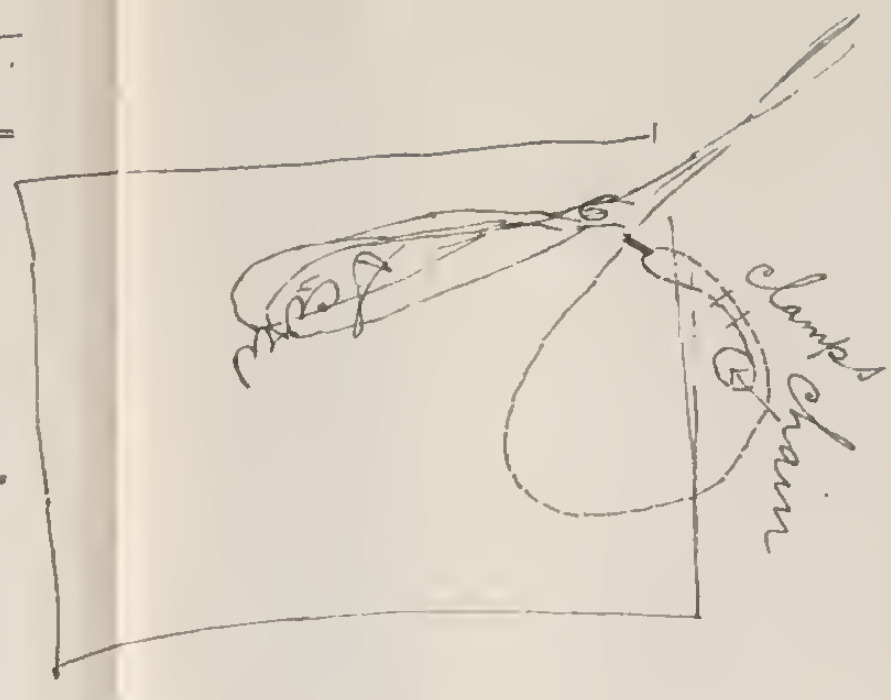
vs

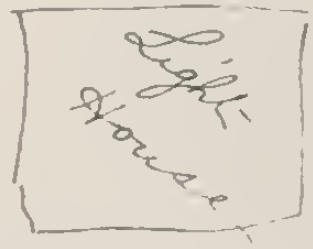
THE "PACIFIC"

EXHIBIT 13 Libellant's.
Filed MARCH 25th 1907.
FRANK L HATCH Clerk.
By A E. MURPHY
Deputy Clerk.

No. 1866
U.S CIRCUIT COURT OF APPEALS
FOR THE NINTH CIRCUIT.
LIBELLANT'S EXHIBIT "13"
Received JUN. 15 1910.
F. D. MONCKTON Clerk.

Lyle 2/3/07





made by J. A. Lyle, witness for libellee on examination in p.

S. S. "SIBERIA" & OWNERS—4.

Forward.....$3126.64

13.

Turned off edges of three starboard propeller blades.

Blacksmiths & helpers.....	1 hr.	1.25	1.25	
Machsts. Fitting.....	10	.60	6.00	
Plateworkers	19	.45	8.55	
Air hammer.....	29	.80	23.20	
Riggers' helpers.....	35	.35	12.25	
Tug	2	2.00	4.00	55.25

14.

Replaced three blades on starboard propeller hub, and cemented over nuts at base of blades.

Machsts. Fitting.....185 hrs		.60	111.00	
Machsts. helpers.....137		.35	47.95	
Cementers	45	.45	20.25	
Riggers	10	.45	4.50	
Riggers' helpers.....	60	.35	21.00	
Tug	3	2.00	6.00	
			$ 210.70	
Red lead putty.....270#		.15	40.50	
3—Bbls. Portland cement.....		3.00	9.00	260.20

Total.....$3442.09

[Endorsed]: No. 71. (Title of Court and Cause.) Exhibit 6, Libellant's. Filed March 14th, 1907. Frank L. Hatch, Clerk. By A. E. Murphy, Deputy Clerk.

No. 1866. U. S. Circuit Court of Appeals, for the Ninth Circuit. Libellant's Exhibit "6." Received Jun. 15, 1910. F. D. Monckton, Clerk.

— LIBELLEE'S EXHIBIT 'A' (In Evidence) —

455 No 71

United States District Court.
Territory of Hawaii

PAC MAIL S S CO.

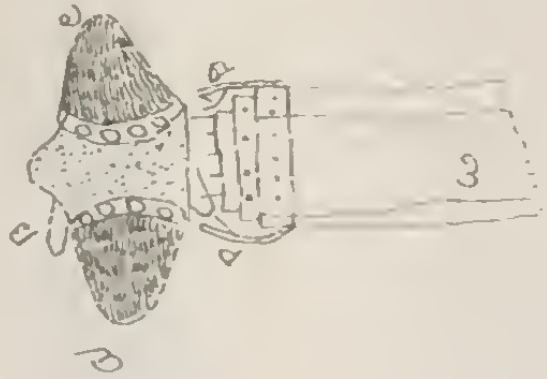
vs

THE 'PACIFIC'

EXHIBIT in connection with
Deposition D DOMEL on behalf Libellant
Filed FEB 2, 1907
FRANK L HATCH
Clerk
By
Deputy Clerk
Filed in Open Court

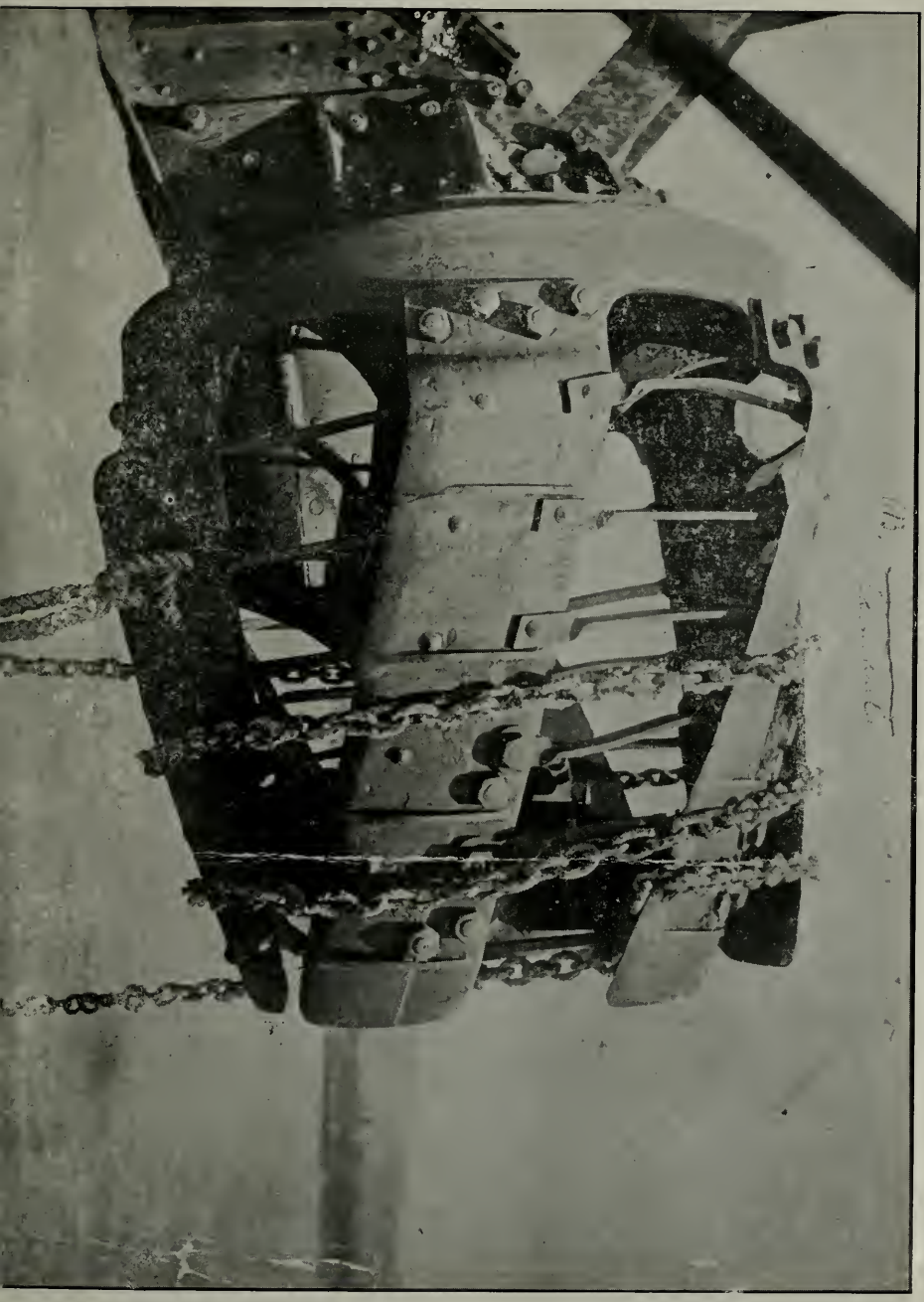
EXHIBIT A Libellee
In evidence
Filed MCH 12 07
FRANK L HATCH
A E MURPHY Deputy Clerk

~~Introduced by Libellee to be~~
Identified as exhibit drawn by the
witness Domei to be introduced in
evidence D. B. D.



No 1866
U S CIRCUIT COURT OF APPEALS
FOR THE NINTH CIRCUIT.
LIBELLEE'S EXHIBIT 'A' (In Evidence)
Received JUN 15. 1910
F D MONCKTON. Clerk.

Libelee's Exhibit "H."



[Endorsed]: No. 71. United States District Court, Territory of Hawaii. Pacific Mail Steamship Co. vs. The "Pacific." Exhibit "H," Libellees. Filed March 15th, 1907. Frank L. Hatch, Clerk. By A. E. Murphy, Deputy Clerk.

No. 1866. U. S. Circuit Court of Appeals, for the Ninth Circuit. Libellee's Exhibit "H." Received Jun. 15, 1910. F. D. Monckton, Clerk.

[Endorsed]: No. 71. United States District Court, Territory of Hawaii. Pacific Mail Steamship Co. vs. The "Pacific." Exhibit "H," Libellees. Filed March 15th, 1907. Frank L. Hatch, Clerk. By A. E. Murphy, Deputy Clerk.

No. 1866. U. S. Circuit Court of Appeals, for the Ninth Circuit. Libellee's Exhibit "H." Received Jun. 15, 1910. F. D. Monckton, Clerk.

[Endorsed]: No. 71. United States District Court, Territory of Hawaii. Pacific Mail Steamship Co. vs. The "Pacific." Exhibit "H," Libellees. Filed March 15th, 1907. Frank L. Hatch, Clerk. By A. E. Murphy, Deputy Clerk.

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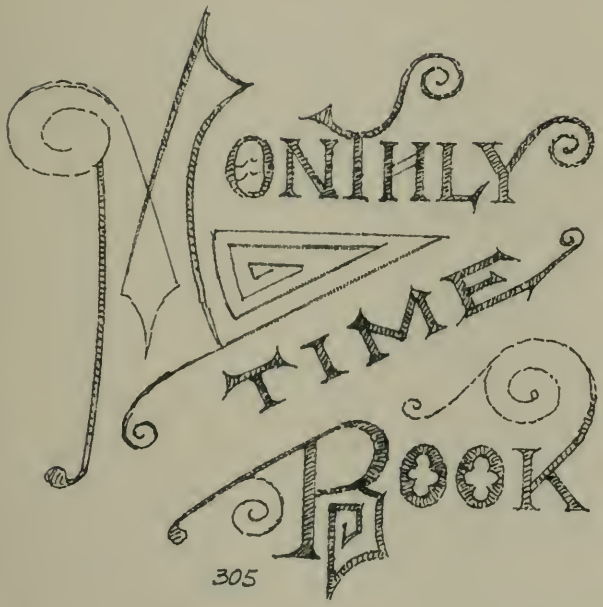
No. 1866. U. S. Circuit Court of Appeals, for the Ninth Circuit. Libellee's Exhibit "H." Received Jun. 15, 1910. F. D. Monckton, Clerk.

Nov. ^ Nov Nov 1905



Morse

Exhibit "O" Libellee's

No. 1866.
U. S. CIRCUIT COURT OF APPEALS
FOR THE NINTH CIRCUIT.
LIBELLEE'S EXHIBIT "O"
Received JUN 15. 1910.
F. D. MONCKTON, Clerk.

Time Book for the

NAMES	1	2	3	4	5	6	7	8	9	10	11	12
J. Morse	1	1	1	1		1	1	1	1	1		
KoaRanu			1	1		1	1	1	1	1	1	
Kegwe			1	1		1	1			1		
J. Silva	¼	1	1			1	1	1		1		
Tom Ai		1					½			1		
B Jimmy	½	1	1	1		1	1			1	1	
Mahoe	¼	1	1	1		1						
Alama		1	1	1		1						
Kapela		1	1	1		1					1	
Pololu		1	1	1		1						
Kolii		½	1	1								
T Van Geeson		1	1	1		1						
R. Sinffen												
A Carvalho												
Kahanbelico		1	1	1	1		1	1	1	1	1	1
Geo Kaolopa		1	1		1		1	1	1	1	1	1
Maluho		1	1		1		1	1	1	1	1	1
Kahuhukai		1	1	1	1		1	1	1	1	1	1

Month of ..... Nov 1905

18	19	20	21	22	23	24	25	26	27	28	29	30	31	Total Time	Rate	Amount	
1		1	1		1	1	½		1		1			20½	4.50	92	25
		1	1	1	1	1								14½	2.75	39	87
1		1				1								11	2.50	27	50
1		1			½	½								13¼	2.50	33	12
1		1	1	1	½	½								10½	2.50	26	25
1		1	1	1	½	1			1					17½	2.00	35	
														5¾	1.50	8	62
		1			1	½	(1)		1	½				10½	1.50	15	75
		1			1	½			1	½				13	1.50	19	50
		0			1	½			1					9	1.50	13	50
														3½	1.50	5	25
									1					6	1.50	9	00
		1			½	½								2	3.00	6	
					½	½			1					2	2.00	4	
																	61
															3	35	61
1		½	1	1		1	1		1	1	1			23	1.50	34	50
1		1	1	1	1	1	1		1	1	1			24		36	00
1		½	1	1	1	1	1		1	1	1			23		34	50
1		½	1	1	1	1	1		1	1	1			24		36	00
																141	00

Time Book for the

NAMES	1	2	3	4	5	6	7	8	9	10	11
							Chann				
J Morse	/	/									
J Silva	1/4	/									
Inahoe	1/4	/									
T. ai		(/)					1/2				
Kopeda		/									
alama		/									
Polohu		/									
B Jimmy		/									
Kolu		/									
Van Dieson	/	/									
								Mum			
B Jimmy	1/2	/					1/2				
Kolu	1/2										
KooRamu							1/2	/			

Month of Nov. 1905

18	19	20	21	22	23	24	25	26	27	28	29	30	31	Total Time	Rate	Amount
														2	4.50	9 00
														1¼	2.50	3 12
														1¼	1.50	1 87
				[3 days]									1½	1½	2.50	~~3 75~~ 3 75
														1	1.50	1 50
	1													2	1.50	3
													(1)	2	1.50	3 00
														1	2.00	2
														1	1.50	1 50
														2	1.50	3
																~~21 74~~
																35 49
																3 75
																31 74
														1	2.00	2
														½	1.50	75
														1½	2.75	4 12
																6 87

Time Book for the

NAMES	1	2	3	4	5	6	7	8	9	10	11	12
												Finish
Tom Ai	/											
Kapela	/		/	/								
Alama	/		/									
Pololu	/		/									
Kolii			/	/								
												9
Morse				/				/	/			
Alama				/								
Pololu				/								
Koakanar								/	0			
J. Silva								/				
B Jimmy	X											
Keawe												
Tom Ai												
R. Sniffen												

Month of 1905

17	18	19	20	21	22	23	24	25	26	27	28	29	30	31	Total Time	Rate	Amount	
															1	2.50	2	50
															3	1.50	4	50
															2	1.50	3	00
															2	1.50	3	
															2	1.50	3	
																	16	00
		1	½	1		1									7½	4.50	33	75
						0									1	1.50	1	50
						0									1	1.50	1	50
			0	1	1	1							0		5	2.75	13	75
	1		1												4	2.50	10	00
	0			1	1	½							0		3½	2.00	7	
	1		1												2	2.50	5	
				1	1	½									3½	2.50	8	75
			½												½	3.00	1	50
																	82	75

Time Book for the

NAMES	1	2	3	4	5	6	7	8	9	10	11	1
							Track					
Morse			/				½					
Koa Ranu			/				/					
J Silva			/			/	/					
Keawe			/			/	/					
B Jimmy			/									
Mahoe						/						
F Van Gieson			/	/								
Pololu						/						
Alama						/						
Kapela						/						
							O	S	S			
Morse						/	½					
Koa Ranu				/		/	½					
B Jimmy	X			/		/	½					
T Van Gieson						/						
R Suffern												
A Carvalho												
Kapela												
F Van Gieson												

Month of ...Nov.....1905

17	18	19	20	21	22	23	24	25	26	27	28	29	30	31	Total Time	Rate	Amount
															1½	4.50	6 75
															1	2.75	2 75
															3	2.50	7 50
															4	2.50	10
															1	2.00	2 00
															3	1.50	4 50
															2	1.50	3
															1	1.50	1 50
															1	1.50	1 50
															1	1.50	1 50
																	41 00
		½													2	4.50	9
		⊘													2½	2.75	6 87
												2½			2½	2.00	2 3
		⊘													1	1.50	1 50
		½													3.00		1 50
										1					1	2.00	2
										1					1	1.50	1 50
										1					1	1.50	1 50
																28.87	~~26 12~~

Time Book for the

NAMES	1	2	3	4	5	6	7	8	9	10	11	12
												Wash
J Morse												
W Lawrance							1	1	1	1	1	
Tom A							½	1	1			
Mahoe							1	1		1		
Kobi							1	1	1	1	1	
alama							1	1	1	1		
Pololu							1	1		1		
Kapela							1	1	1	1		
Van Guson							1	1	1	1	½	
B Jimmy									1	1		
Keawe									1	1		
J Silva										1		

Month of..... 190

17	18	19	20	21	22	23	24	25	26	27	28	29	30	31	Total Time	Rate	Amount
															7	2.50	17 50
															2½	2.50	6 25
1		1	1	1	1	1	½								9½	1.50	14 25
½		1	1	1	1	1	½								16	1.50	24
							½								4½	1.50	6 75
							½								3½	1.50	5 25
							½								4½	1.50	6 75
½		1	1	1	1	1	½	1	1	1					18½	1.50	27 75
															2	2.00	4
															2	2.50	5
															1	2.50	2 50
																	120 00

Time Book for the

NAMES	1	2	3	4	5	6	7	8	9	10	11	12	Score
J. Morse										1			
Keawe	X									1	0		
B Jimmy	X									1	1		
J. Silva										1			
Tom: ai										1			
Kapela											1		
Koakane										1	1		
Alana		X											
Pololu													
Mahoe													

Month of .... Nov. 1905

17 18 19 20 21 22 23 24 25 26 27 28 29 30 31	Total Time	Rate	Amount
	3	4.50	13 50
(2)	3	2.50	5 00
(5)	4	2.00	10
	4	2.50	10
	2	2.50	5
	4	1.50	6 00
(3½)	4	2.75	9 62
(1½)	1	1.50	1 50
	1	1.50	1 50
	1	1.50	1 50
			68 50
			64 37
			24
			64 13

Time Book for the

NAMES	1	2	3	4	5	6	7	8	9	10	11	12	13
J Morse													
Keawe													
Tom Ai													
Pololu													
Brahoe													
alama													
R Sniffen													
J Silva													
A Cawalho													
Kapela													
B Jimmy													
Pololu													
Kapela													
Alama.													
Tom. Ai													

Buoys

Kenau

Month of 190

17	18	19	20	21	22	23	24	25	26	27	28	29	30	31	Total Time	Rate	Amount
rrings																	
															1	4 50	4 50
															1	2 50	2 50
							½								1½	2 50	3 75
						1									1½	1 50	2 25
															½	1 50	75
						1									1½	1 50	2 25
						½	½								1	3	3
						½	½								1	2 50	2 50
						½	½								1	2 00	2 00
						1									1	1 50	1 50
																	25 00
			1												1	2 00	2 00
			1				½								1½	1½	2 25
			1				½								1½	1½	2 25
							½								½	1½	75
			1												1	2 50	2 50
																	9 75

Time Book for the

NAMES	1	2	3	4	5	6	7	8	9	10	11	12
G Morse												
Koakanu												
Malwe												
Pololu												
alama												
Keawe												
J Silva												
B Jimmy												
Tom ai												
Kapela												
Keawe												
Tom ai.												
Jimmy												
Lumba 30.95												
Labor												

Scal

Month of Nov. 1905

17	18	19	20	21	22	23	24	25	26	27	28	29	30	31	Total Time	Rate	Amount
/	/																
/	/																
/	/																
/	.																
.	.																
	/																
	/																
/	/																
															/	2.50	2 50
															/	2.50	2 50
1/2															1/2	2.00	1 00
																	6 00

Paid

= 49.25

Time Book of The

NAMES	1	2	3	4	5	6	7	8	9	10	11	12
							Rekua					
J Borse	X											
Koakanu												
Keawe												
B Jimmy	½											
Alama	½											
Kapela												

Month of... Nov. 1905

17	18	19	20	21	22	23	24	25	26	27	28	29	30	31	Total Time	Rate	Amount
							1 1/2			(1)		1	(3 1/3)		2 1/2	~~4.50~~	~~7.50~~ 11.25
							1								1	2.75	2.75
							1								1	2.50	2.50
							1			(1)			(2)		1	2.00	2.00
										(1)	1/2		(1 1/2)		1/2	1.50	1.50
											1/2				1/2	1.50	.75
																	.75
																	~~20.00~~
																	28.00
																	~~4.50~~
																	23.50

Time Book for the

NAMES	1	2	3	4	5	6	7	8	9	10	11	12	1
							Hosh						
Kahuhukau				6							8		

Month of Nov 1906

17	18	19	20	21	22	23	24	25	26	27	28	29	30	31	Total Time	Rate	Amount
ar Ret																	
O																	

Time Book for the

Water

NAMES	1	2	3	4	5	6	7	8	9	10	11	12
B Jimmy	½											
Kolii	½			4								
F Van Gieson	1											

Month of 190

18 19 20 21 22 23 24 25 26 27 28 29 30 31	Total Time	Rate	Amount
rks Likelike w.f.			
	½	2 00	1 00
	½	1 50	75
	½	1 50	1.50
			3.25

#83

No. 71

United States District Court.
Territory of Hawaii.

PACIFIC MAIL S. S. Co.

vs.

THE "PACIFIC"

EXHIBIT "O" Libellee's.
Filed MARCH 25th, 1907.
FRANK L. HATCH, Clerk.
By A. E. MURPHY, Deputy Clerk.

Libelee's Exhibit X.

Receipt to Warrant under Regular Pay Roll.

In case the person to whom the Government is directly indebted desires his Warrant made payable to another he will so indicate by filling in the Endorsement Blank on the back hereof, leaving the signature to the Receipt below, blank

GIVE POSTOFFICE ADDRESS

December 2nd — 1905.

Received from the AUDITOR, Warrant No. 554

for Six 2nd 87/100 Dollars, in full for

Deaves's Garnishee

as Carpenter - Landings and Wharves - new. Salary for the month of November 1905,

sb 87

Witness

alw his # Young

mark

ENDORSEMENT BLANK.

The Auditor will please issue warrant for the within named Salary to the order of

....

(Signed).....

NOTE:—This Receipt is NOT NEGOTIABLE; and when signed (or endorsed) must be forthwith forwarded to the Auditor who will issue Warrant in favor of the person to whom the Government is directly indebted, or to the person by him designated in the endorsement above, and to no other.

usen	"	F Van Gieson	6	1 50		9	
ho	Sweeper	Kahanubio	23	"		34	50
opa	"	Geo. Kaolopa	24	"		36	00
	"	malua	23	"		34	50
kai	"	Kahihikai	24	"		36	00
						552	86
		Keawe	554			6	87
		Pay Roll	555			545	99
						552	86

I HEREBY CERTIFY THAT I HAVE WITHHELD THE FOLLOWING AMOUNTS ON ACCOUNT OF GARNISHEES.

AUDITOR

Witness to Signatures.

W. P. Fennell

Entered

ENDORSEMENT BLANK.

The Auditor will please issue warrant for the within named Salary to the order of

....

(Signed).....

NOTE:—This Receipt is NOT NEGOTIABLE; and when signed (or endorsed) must be forthwith forwarded to the Auditor who will issue Warrant in favor of the person to whom the Government is directly indebted, or to the person by him designated in the endorsement above, and to no other.

LABOR PAY ROLL

TERRITORY OF HAWAII,
DEPARTMENT OF PUBLIC WORKS

Honolulu Nov 30 1905

2191 BUREAU OF

We the undersigned, hereby severally acknowledge that we have received from C M WHITE, CHIEF CLERK the amounts set opposite our respective names same being Wages in full to date

Original

Appropriation LANDINGS AND WHARVES, GENERAL

NAME	OCCUPATION	SIGNATURE	DAYS WORKED	RATE PER DAY	AMOUNT
Jas. E Ward	Machinist	J. E. Ward	"	4 75	52 25
John Teves	Helper	John Teves	12	2	24 00
Jas. Morse	Foreman	James Morse	20½	4 50	92 25
Koakanu	Carpenter	Koakanu	14½	2 75	39 87
Keawe	Self 20 63 Garnishee 6 87	Keawe	11	2 50	27 50
J Silva	"	J S Silva	13¼	2 50	33 12
Tom Ai	"	Tom Ai	10½	2 50	26 25
B Jimmy	Laborer	B Jimmy	17½	2	35
Mahoe	"	Mahoe	5¾	1 50	8 62
Alama	"	Alama	10½	"	15 75
Kapela	"	Geo Kapela	13	"	19 50
Pololu	"	Willie Pololu	9	"	13 50
Kolu	"	his x Mark Smith	3½	"	5 25
R. Snyffen	Carpenter		2	3	6
A Carvalho	Laborer	A Carvalho	2	2	4
F Van Gusen	"	F Van Gusen	6	1 50	9
Kahaulelio	Sweeper	Kahaulelio	23	"	34 50
Geo Kaolopa	"	Geo Kaolopa	24	"	36 00
Malau	"	Malau	23	"	34 50
Kaluhekai	"	Kaluhekai	24	"	36 00
					552 86
I HEREBY CERTIFY THAT I HAVE WITHHELD THE FOLLOWING AMOUNTS ON ACCOUNT OF GARNISHEES.		Keawe	554		6 87
		Pay Roll	555		545 99
AUDITOR		Witness to Signatures			552 86
Entered		H. A. Fennell			

I hereby certify that the above services have been faithfully performed

APPROVED

Govt. Officer directly incurring the expense

Superintendent of Public Works.

No. 1866

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit.

THE NORTH AMERICAN DREDGING COMPANY (a corporation), claimant of the Steam Dredge "Pacific", her engines, machinery, boilers, etc. (libelee),

Appellant,

vs.

THE PACIFIC MAIL STEAMSHIP COMPANY (a corporation), (libelant),

Appellee.

BRIEF FOR APPELLANT.

NATHAN H. FRANK,
IRVING H. FRANK,
Proctors for Appellant.

Filed this.....day of October, 1910.

FRANK D. MONCKTON, Clerk.

By.....Deputy Clerk.

PERNAU PUBLISHING CO.

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Statement of the Case.

On November 10, 1905, the steamship "Siberia", with her keel imbedded in the mud, began maneuvering in the harbor of Honolulu to make a turn and proceed to sea. While doing so she picked up a wire cable in her propeller, and wound the same about her propeller tube. She then proceeded out of the harbor and into the open ocean, where she came to an anchor.

> "No necessity appears in the testimony for the movement which took place to the outside of the harbor. It was not an emergency under difficult and

> dangerous circumstances, which would excuse a master or a pilot from ordinary cool judgment. The ship was within a few hundred feet from the city wharves and might have been taken there either by warping or the assistance of a tug, or both", etc. (Rec. p. 1033).

After anchoring, she procured the services of a diver to examine the propeller and report thereon. The diver separated the cable from the chain attached to the buoy, and cut the cable, but was unable to take the same off the propeller tube without the use of staging which he would have to put underneath the propeller. This operation was somewhat difficult in the open ocean, but if, instead of proceeding to sea, the vessel had remained in the harbor and gone alongside of the dock, or had thereafter returned to the harbor by the use of a tug, the operation would have been easy (p. 624). The diver reported to the captain of the steamship that it would take him perhaps *another day* to get the wire off. The steamer, however, did not wait for that operation, but proceeded on her voyage to Yokohama with the wire cable upon her propeller tube. On this voyage the propeller showed signs of interference, as the starboard engine appeared to be about a turn slower (p. 214).

When the vessel arrived in Yokohama the wire cable was taken off in the harbor *by means of a diver,* which operation occupied about *three days.* The vessel was not docked. She then continued upon her voyage to Hong Kong, and returned to San Francisco, where she was placed in dock and her shaft drawn. It was then found that *individual small wires composing the strand*

had unwound from the cable and worked into the sleeve, destroying or injuring the lignum vitae of which the sleeve is composed, and doing other damage.

The examination by the diver at Honolulu showed that the wire had then done no more than wrap itself around the outer tube and the hub of the propeller, which outer tube, holding the shaft, is a closed steel tube proceeding from the side of the ship to within ⅜ of an inch of the hub (p. 620), the round of the hub going a little inside of the propeller tube (p. 620).

The trial judge, in his opinion, shows conclusively that he failed to apprehend the construction of this part of the vessel, having confused the *sleeve* with the *tube,* and having assumed that the wire when first picked up wound around the propeller *shaft* itself, which is a physical impossibility. This matter will be noticed in more detail hereafter.

Almost the entire damage resulted from the failure of the master of the steamer to remain in the harbor of Honolulu and disengage the wire from his propeller before proceeding upon his voyage.

The claimant in this case was engaged under a contract with the United States Government in dredging and deepening the harbor of Honolulu.

The dredge in its operation was made fast to points on either side by wire cables that were anchored, or moored, at a distance, and by means of which the dredge was swung from side to side as the work progressed. When the work was completed at a given point the dredge was moved ahead, and a new set of wires laid

out for such operation, the old wires being dropped and buoyed until such time as the dredge should have been made fast to the new wires, when the old wires were picked up and taken on board.

It is the claim of the steamship company that the steamer's propeller fouled one of these wires that had been left lying on the bottom of the harbor.

It is the contention of the dredge that its wires had been taken up before the time in question.

It also appears in the evidence, undisputed, that the harbor of Honolulu has in its bottom many wires that have been dropped and abandoned by vessels moored in said harbor. This has been going on for years, and the dredge in its operation has frequently picked up such wires. Moreover, the buoy to which the particular wire here in question was attached, was placed and maintained in said harbor for the purpose of providing anchoring facilities for vessels, and warping steamers out from the wharf, and in such use of the buoy it had also been the practice to make fast by throwing a loop over it.

It is the contention of the dredge that there is no evidence in the record by which the wire found upon the hub of the steamer can be identified as the wire of the dredge. On the contrary, that, from its nature, it is shown not to have been the wire of the dredge.

The entire case of the *libelant* is admitted by the Court to rest upon circumstantial evidence, and it is the contention of the dredge that such circumstantial evidence does not afford a direct inference that the wire

in question was the wire of the dredge, but the best that can be said in that behalf is, that an inference more or less fallible must be built upon a similar inference before the desired conclusion can be arrived at. It is elementary law that such a mode of arriving at a conclusion of fact is generally, if not universally, inadmissible. It may be a misfortune to the steamer to pick up a wire, but the dredge should not be made to shoulder that misfortune simply because it is an available victim. Its act must be shown to have caused the misfortune.

We take up, therefore, for consideration, the two propositions, viz.: 1. Was the wire which was found on the "Siberia's" propeller, the wire of the dredge "Pacific"?; 2. If it was the wire of the dredge "Pacific", was the damage complained of, the proximate result of the negligence of the claimant, or of the negligence of the appellee?

I.

WAS THE WIRE WHICH WAS FOUND IN THE "SIBERIA'S" PROPELLER THE WIRE OF THE DREDGE "PACIFIC"?

As already suggested, the determination of this question, so far as libelant is concerned, rests entirely upon circumstantial evidence, and this fact is recognized by the trial Court (p. 1011). *On the part of the dredge,* however, the evidence *against* such a finding is *direct* evidence.

The endeavor, therefore, of the libelant at the trial was to eliminate the direct evidence by attempting to

discredit the witnesses thereto, and the decision of the trial Court of necessity followed that line of argument. Upon this phase of the case we will comment later. We now consider the questions involved upon the circumstantial evidence alone, for that is the best case that libelants can make. It is our contention that, even disregarding the direct evidence in favor of the claimant, and considering alone the circumstantial evidence both in favor of and against the proposition, the appellee would still not have proven its case.

The following facts appear without dispute:

1. The dredge, at some time during its operations, made a swinging wire fast to Buoy No. 2.

2. It is admitted by both parties that the wire so in use was about 700 feet long. This wire was attached to a loop composed of about 100 feet of wire, which loop was in its turn thrown over the Buoy No. 2 and thus made fast to it.

3. After completing its operations at the point where that swinging wire was useful, it was disconnected and dropped to the bottom of the harbor.

4. It was the rule of the dredge people, after disconnecting a swinging wire, to buoy the end with a *wooden float,* and thus buoyed to allow it to remain in the bottom of the harbor until they had adjusted a swinging wire to their new position, and then to pick up the first one.

5. At the trial it was admitted by appellee that the 700 foot wire was taken up on November 6th, before the

accident, but it is contended that the loop about the buoy chain was allowed to remain.

6. The steamer "Siberia", *after the dredge had operated in several new positions, and had entirely completed its work in that part of the harbor,* picked up a wire fastened to Buoy No. 2.

7. The wire picked up by the "Siberia" was right lay wire. The wire in common, if not exclusive, used on board that dredge during the time in question, was right and left lay.

8. The wire found on the "Siberia" had a loop around the chain of the buoy made by bending the end of the wire around the chain of the buoy, and fastening it *with clamps,* to the main wire at a point *5 or 6 feet from the bend.* But the dredge people made their swinging wires fast to the buoy by a large open loop, *both ends of which were fastened to a shackle about 50 feet from the bend of the loop.*

9. The purpose for which Buoy No. 2 was intended and for which it was placed in its position was to warp steamers out from the opposite wharf by means of a line carried to the buoy.

10. Wires of the size and length of the one found in the "Siberia's" propeller were picked up by the cutter of the dredge during the dredging operations, and were found by others in the bottom of the harbor before dredging operations were begun.

There are secondary circumstances which are attempted to be marshalled in support of the libelant's contention, which being secondary, we shall consider later.

With these facts before it, the trial Court begins the consideration of the matter with the following observation:

> "A preliminary question comes up in relation to this issue. It is alleged in Articles 13, 14 and 15 of the libel, that the libelee, having been operating in the vicinity of the Marine Railway for a few days immediately prior to said 10th day of November, 1905, and being then connected with the anchor chain of the buoy in question by wire cable, she changed her working locality to a point toward the harbor entrance, but before doing so, cast off the said wire cable and caused the end of the section of said cable immediately connected with said anchor chain of said buoy to drop to the bottom of said harbor, *where it lay on said 10th day of November, A. D., 1905, a menace and obstruction to the free navigation thereof.* The claimant, in Article 15 of the amended answer, admits that at the time alleged in the libel, the dredge 'temporarily caused the end of the section of the said cable immediately connected with said anchor chain of said buoy to drop to the bottom of the said harbor, but alleges that the same was taken up and removed from said position * * * before the said 10th day of November, 1905.'
>
> "*From these pleadings there develops the negative proposition that the libelee did not remove such cable from the bottom of the harbor and the chain of the buoy before the 10th day of November, the day of the accident.*"

With this observation upon the state of the pleadings, the Court holds that the claimant, being in possession of information relating to the question of the removal of the cable from the buoy, and the libelant not being in possession of such information, the burden is upon the claimant to show that the cable was removed before

the time of the accident and this, upon the assumption that the pleadings *develop the negative proposition* that the claimant did *not* remove such cable from the bottom of the harbor, etc.

In taking this position, the Court has made an initial error which affects its entire consideration of the evidence, for it has improperly construed the admission of the answer. The libelant has alleged and its case depends upon its proving not only that we cast off the wire cable, but also its additional *allegation that we allowed it to remain there* as an obstruction to navigation. The material part of that allegation is that we allowed the cable to remain there on the 10th of November, 1905, as an obstruction to navigation, and that is *directly put in issue* by the answer. The introductory fact that we originally cast it off is not a material allegation.

But in the foregoing quotation from the pleadings made by the trial Court, only part of Article 15 of the answer is quoted, and perhaps it is because the trial Court overlooked the express denials in that article of the answer, and only treated of the admissions, that it fell into the above error. Article 15 of the answer, before the admission quoted by the Court, contains the following express denial (p. 69):

> "Denies that for her own convenience in her subsequent dredging operations, or otherwise, or at all, except as hereinafter alleged, the said dredge caused the end of the section of said cable immediately connected with said anchor chain of said buoy to drop to the bottom of said harbor; *and further denies*

that it lay there on the 10th of November, A. D., 1905, or that it was at any time or at all a menace or obstruction to the free navigation thereof.''

We have there an explicit and express denial of the only material fact alleged in the libel.

The affirmative allegation is thus directly put in issue, and it was for the libelant to prove *its allegation that our wire lay there on the 10th of November, 1905, a menace and obstruction to* the free navigation of said harbor.

The Court makes a grave error, therefore, when it passes by the direct affirmative issue thus presented, and if we be right in this contention, then it is clear that the Court not only entered upon the consideration of the testimony with a wrong premise and an improper measure of its effect, but of necessity erred in its *finding* which is based upon this proposition of the burden of proof (p. 1026).

The case of Scott v. Wood, 81 Cal. 398-402, seems to be directly in point upon this question. In that case, as in the present, the answer contained an admission of an existing state of facts, to-wit: an employment for a long period of time at the rate of $250 a month, but put in issue the allegation that that rate of compensation *continued to the end of the employment,* and the same question of burden of proof arose which is here present. Whereupon that Court said:

> ''In the present case we think that the learned judge of the trial court fell into error from overlooking the distinction above pointed out. Why was the defendant required to have a preponderance of

evidence? *Did he have the affirmative of the issue? We think not.* The plaintiff had received money sufficient to discharge his claim if the rate of wages was $200 a month. His position was that the rate was $250 a month. It was necessary to his case that *the continuance* of the latter rate *through the period claimed,* or some part of it, should be established. If that rate did not so continue, *he could not recover.* The *continuance* of the higher rate being an essential fact in his case, the rules of pleading required him to allege it in his complaint. If he had alleged it categorically, *and the defendant had denied it explicitly,* it would have been entirely clear that the plaintiff had the affirmative of the issue. If anything further than the mere statement of such pleadings be required to show this, it is found in the test ordinarily used, and said to be conclusive, and embodied in our statute, viz.: Which side would be successful if no evidence at all were introduced? (See 1 Best on Evidence, Morgan's ed., p. 268; 1 Phillips on Evidence, 4th Am. ed., p. 812; Code of Civ. Proc., sec. 1981.)

"Now, the pleadings here are in substance the same as above stated. And it is *the substance* which must control on this question, and *not the mere form.* (1 Greenl. Ev., 13th ed., p. 74; 1 Best on Evidence, Morgan's ed., p. 372.)"

* * * * * * *

"The complaint was not drawn with absolute precision."

* * * * * * *

"But we treat the complaint as sufficiently *alleging* that the rate did, in fact, *continue as it commenced. This essential* allegation was put in issue by the answer. * * * *The fact that the traverse was affirmative, and not purely negative in form, did not destroy its force or change its essential nature.*"

The above quotation may be applied *nutatis mutandis* to the pleadings now under consideration.

In that case too, the lower Court fell into precisely the same error of reasoning as did the District Court of Hawaii in the present case, for upon those pleadings it instructed the jury as follows (p. 400):

> "The defendants *admit* employing the ~~defendant~~ plaintiff on July 3, 1869, at the rate of $250 per month, and that he worked for them continuously until the first day of April, 1885; and that the *burden of proof* is upon the *defendants* to show that *plaintiff's compensation was changed;* that unless the *defendants* establish *by a preponderance of testimony* that plaintiff, in 1870, or at some other time, agreed to work for the defendants during the years 1870 and 1871 at the monthly compensation of $200, then they must *find for the plaintiff.*"

The parallel between the instruction above quoted, and the reasoning of the Court in the present case, seems to us to be perfect. In the case at bar, the District Court say that the defendants admit dropping the wire to the bottom, and therefore the burden of proof is on the defendants to show that that condition *was changed;* that unless the defendants establish by a preponderance of testimony that that condition was changed, he must find for the plaintiff.

But the instruction above referred to was held to be error, and the ground for such ruling is very carefully and thoroughly discussed in that case.

While, therefore, under the pleadings as they stand, there is an admission that *some days before* the accident we dropped a wire to the bottom of the harbor, there is no admission, nor is there any proof that, as matter of fact, the wire so dropped to the bottom of the harbor

was there at the time of the accident. Leaving, as we do, out of consideration in the present argument the direct testimony on behalf of the dredger, of Spencer and Matson, that the wire was in fact taken up before the said date, and giving to the steamship the strongest case contended for, we have the following:

We admit we disengaged the wire and dropped it to the bottom of the harbor. Nothing else appearing, the law *presumes* it remained there as long as such things usually remain. It does *not* presume that it remained *until it is shown to have been removed* (Scott v. Wood, 81 Cal. 404). But we will allow the libelant the benefit of any doubt on this question by assuming that the law presumes it remained there *until the accident.* Its being there *at the time of the accident* is thus based solely upon *a presumption.* There is neither proof by the libelant nor admission by the claimant of that fact.

But the fact that the *wire was there at the time of the accident* is not proof that *that particular wire* was picked up by the steamer. This, again, depends upon *an inference or a presumption* arising from the fact that the wire was in that vicinity. In order, therefore, to place the wire upon the hub of the propeller of the steamer, we must build the *presumption* that that particular wire was picked up, *upon the former presumption* arising from the fact that the wire was dropped to the bottom, that it remained there *up to the time of the accident.*

But the law is emphatic that such deductions cannot be permitted. *No presumption can be built upon a pre-*

sumption. This principle is well established by the decided cases, reference to one of which alone will be sufficient for the purpose of illustration:

In United States v. Ross, 92 U. S. 281, the Court, speaking of "inferences from inferences, presumptions " resting on the basis of another presumption", said:

> "Such a mode of arriving at a conclusion of fact is generally, if not universally, inadmissible. No inference of fact or of law is reliable, drawn from premises which are uncertain. Whenever circumstantial evidence is relied upon to prove a fact, the circumstances must be proved, and not themselves presumed. Starkie on Ev., p. 80, lays dawn the rule thus: 'In the first place, as the very foundation of indirect evidence is the establishment of one or more facts from which the inference is sought to be made, the law requires that the latter should be established by direct evidence, as if they were the very facts in issue.' It is upon this principle that courts are daily called upon to exclude evidence as too remote for the consideration of the jury. The law required an open, visible connection between the principal and evidentiary facts and the deductions from them, and does not permit a decision to be made on remote inferences. Best, Ev., 95. A presumption which the jury is to make is not a circumstance in proof; and it is not, therefore, a legitimate foundation for a presumption."

It seems to us certain, therefore, that the District Court based its entire decision of this question of fact upon a false premise,—and not that alone, but carried it to a conclusion by means of a loose, illogical and hence illegal process of reasoning, which necessarily destroys its conclusion under any view of the evidence before it.

Neither do the proofs warrant even those remote inferences made by the Court, as no consideration is given to contrary direct inferences, let alone the direct testimony.

THE PROOFS.

Starting with the foregoing principles in mind, let us consider the facts:

1. Direct Testimony of the Wire's Removal.—We begin with the direct testimony of Spencer that he removed the wire before the time of the accident. The District Court is at great pains to discredit that testimony, for he distinctly recognizes that if it stand, the case can proceed no further, but must go to the defense. We shall not at present take up the consideration of the arguments advanced in the opinion for disregarding that testimony, but content ourselves with the suggestion that to our mind they are not logical. Some of them, in their nature, are such as, by recognized rules for the weighing of the credibility of witnesses, point to truthfulness rather than perjury, while most of them are based upon inferences which would not allow a conviction of the pettiest misdemeanor, let alone perjury, which must be found before the judgment can stand.

2. The Indirect Evidence in Favor of the Defense.—It is our present purpose, more particularly to call attention to the indirect evidence, which, in addition to the burden of proof and the direct evidence of Spencer, must be *overcome* by libelant, before its case become

even prima facie, and which indirect evidence tends at the same time to support and to corroborate the statement of Spencer.

It will be borne in mind that there is not a particle of direct evidence in favor of libelant which identifies the cable on the hub of the propeller as the cable of the dredge. As already suggested, it is built entirely upon inferences more or less fallible.

By drawing those inferences, the Court seems to have overlooked many contrary inferences, some almost conclusive in their nature, which point to the fact that the cable found on the propeller, *was not our cable.* Let us not become confused in the consideration of this question by "cable cases" where the *identity* of the cable picked up was *not in issue.* The Court has cited many of these, and we make no contention that if the cable be *ours* it makes a *prima facie* case of negligence. But our contention is that no such *prima facie* case has arisen, because the proofs fail to identify the cable as *ours.* It is not enough to make us liable that the steamer has picked up *some* cable—she must have picked up *ours.*

Let us now point out some of the circumstances above alluded to.

A. *The Wooden Float.*—It was the rule with the appellant to buoy the end of the sunken wire with a wooden float (Nelson, p. 379). Indeed, in an attempt to identify the wire found on Buoy No. 1 as appellant's, appellee's witnesses testified that, when they pulled on it they noticed a wooden float, out in the stream, start and approach them.

The wire picked up by the "Siberia" *had no wooden float attached.* No float was found on the hub of the propeller when the wire was removed; and the fact that no float appeared on the surface when the wire was picked up is strenuously insisted upon by Lorentzen and other witnesses for appellee. In fact, all the testimony upon the subject is to the effect that *it had no such float.*

There is no evidence of any exception to *this rule* of attaching a wooden float. Neither is it reasonable or probable that a wire would be dropped without a float because, without the wooden float and rope attached, it would be very difficult to pick up the wire when required —in fact, impossible without the use of grappling irons. The absence, therefore, of this float is convincing proof that the wire actually picked up was *not* the wire of the dredge "Pacific". Nowhere in the testimony is this fact explained or the strength of it in anywise minimized. On the contrary, its strength is admitted when appellee, in its attempt to prove the wire attached to Buoy *No. 1* was our wire, calls attention to the wooden float attached to *it.*

B. *The wire picked up by the "Siberia" was right lay wire, the wire in common, if not exclusive, use on board the dredge during the time in question was right and left lay.*—We need not enter into a discussion of the question as to whether or not the evidence warrants a finding that the right and left lay wire was *exclusively* used for swinging wires on board the dredge. We think the testimony warrants that finding, and thereby *ex-*

cludes the possibility of the wire found upon the hub of the propeller being that of the dredge. But, without this finding, our case is sufficiently fortified by the fact, which is beyond dispute, that, up to the time in question, the kind of wire *generally* used by the dredge for swinging wire was right and left lay.

From this fact arises the presumption that the wire here in question was of that construction. There is nothing in the evidence to rebut that presumption. The only attempt in that direction is a showing that, in connecting the pipe lines, some straight lay wire was used; and the testimony of Keawe that the wire found on Buoy *No. 1* was right lay.

Aside from the fact that the wire that Keawe saw is not proven to be the wire of the dredge, the testimony of Keawe is itself far from convincing.

Assuming it to have been proven that the wire picked up on Buoy *No. 1* was one of the dredge's wires, it appears that Keawe, *of all the men who handled and examined the wire* (among whom were such experts and clean-cut observers as Lyle himself), is the only one who *would* testify as to its lay. Yet Lyle went there for the express purpose of examining the wire, whereas Keawe had *no* such purpose (he was only employed to raise the buoy). A man who could not understand the language, and who knew nothing about the proceedings, except that he understood the words "Siberia" and "wire" in the conversation of those about him. Yet he says he examined the wire *for the lay because* he heard that conversation, which he did not understand.

It is beyond the sphere of reasonable credulity that he alone observed and remembered the lay of this wire, when no one else of the brighter and keener observers could testify upon the subject. It was not in their mind at the time—*nor in Keawe's.*

Comment is made by the Court upon the fact that we referred to Keawe as a "common laborer", and the Court speaks of him as a "*mechanic* of long experience " in government work in which he had much to do re- " lating to the use of wire cables and general repairing " work". No better answer can be made to this endorsement of Keawe's experience and knowledge than to ask the Court to read his testimony in connection with this controversy (pp. 915 to 938). Why the District Court should call him a "mechanic", in preference to calling him a "carpenter", which his testimony shows him to be, we cannot understand. In his vocation of carpenter he had nothing to do with wires. Moreover, he was not even a carpenter, in the best sense of that word; he was a mere roustabout, doing odd jobs, whether those of carpenter, or of digging holes, or driving piles. There is nothing in his testimony to show that his experience with wire cables was anything more than cursory or incidental, and he expressly admits that he *never thought* of the lay of the wire *until it was suggested to him by Morse* just before he was called to testify (pp. 936 to 938).

We respectfully ask the judgment of this Court upon the question of Keawe's credibility upon this subject, in face of the fact that Lyle, Klebahn, Halloway and others

(all men of marked intelligence), proceeded to the scow for the purpose of examining and identifying that particular wire as the wire of the dredge, while Keawe proceeded there, not for that purpose, but simply charged with the duty of getting the wire on the scow to permit of such examination by the others—the former participants in the controversy, the latter with no knowledge of the nature of the controversy.

The kind of wire found on the *pipe lines* cuts no figure, for the use to which they were put is different,—a use for which any old wire would be suitable; whereas, only the best kind of wire would be suitable for a swinging wire. This difference in the use of the wire is clearly established by the testimony.

Unless, however, the wire pulled up into the scow from Buoy *No. 1,* at the time testified to by Lyle and Fuller, *be a swinging wire of the dredge "Pacific"* the entire evidence respecting the said wire must go for naught. Upon this subject there is no direct testimony, and such testimony as exists, creates considerable doubt as to whether or not the wire on Buoy No. 1 above referred to was the wire of the dredge, or some other wire. The difficulty is not confined to the testimony of Faria, but it will be found running through the testimony of all the laborers who are said to have been employed in raising the buoy.

Nor is that all:

When everything upon the subject of Buoy No. 1 is said and done, the testimony only amounts to this: from the circumstances proved, it is *inferred* that the wire of

Buoy No. 1, examined by Lyle and others, *was a swinging wire of the dredge.* Then it is again *inferred* that, if the wire of Buoy No. 1 be a swinging wire of the dredge, the wire on Buoy *No. 2* must have been *made fast in the same way,* or was of the same *lay* as that on Buoy No. 1. Hence the *third inference,* viz.: that the wire *found on the hub of the propeller* was the wire of the dredge.

As already shown, such mode of proof is inadmissible, because the reasoning is illogical and dangerous. Inference cannot be built upon inference. Therefore, all this testimony concerning Buoy *No. 1,* as a circumstance tending to identify the wire upon the hub of the propeller as the wire of the dredge, should be excluded from consideration.

C. *The wire picked up by the "Siberia" was found attached to the chain of the buoy by a loop made by bending a short end of the wire around the chain, and fastened with clamps to the long end of the wire at a point 5 or 6 feet from the bend.*

This is an undisputed fact. Lyle's testimony makes it certain.

There is no testimony fixing the use of such a loop upon the dredge for the attachment of its swinging wires to *a buoy.* On the contrary the direct and undisputed testimony of the two men who placed the wire over Buoy No. 2, is to the effect that no such loop was used. Upon this question Spencer is fully corroborated by Matson. The latter testifies (p. 519):

"Q. Were you present when the pennant was thrown over Buoy No. 2?

"A. Yes, sir.

"Q. Were you in a boat with Mr. Spencer?

"A. *I was right on top of the buoy, and threw the bight over myself.*

"Q. You threw the bight over yourself?

"A. Yes.

"Q. Now what kind of a bight was it that you threw over the buoy?

"A. Well, it was a wire pennant about, at least 75 feet long, doubled up, and then the last end or the loop throwed over the buoy.

"Q. And what were the other two ends fastened to, and how were they fastened?

"A. The two eyes?

"Q. Yes.

"A. Fastened on a shackle.

* * * * * * *

"Q. I show you here claimant's Exhibit No. 1, and ask you whether or not that is a fair indication of the manner in which that loop was shackled and put over the buoy?

"A. That is exactly the way we had it."

The exhibit referred to is Libelee's Ex. D in the record (p. 1091).

It is fundamental that the direct testimony of a man who was present and performed the act is to be taken in preference to the testimony of any number of men who testify concerning the same matter viewed from a distance. How much stronger, then, is the position of the man who testifies to the nature of the loop *which he himself threw over the buoy,* than the *questionable inferences* and deductions attempted to be drawn in this case.

Not only is Matson's testimony uncontroverted, but, with leave, we will indulge ourselves in the presumption that it was unassailable; and our reason for this latter assertion is to be found in the fact, as the transcript discloses, that, long before Matson's testimony was thought of by the appellant, *counsel for appellee* had him in his office in Honolulu, where he privately examined him. Concerning this examination, Matson says that it took three-quarters of an hour or an hour during which *"everything came out just about the same thing"* (Rec. pp. 525, 526, etc.). And this appellee has not denied.

That appellee then knew what Matson would testify to concerning this loop, and for that reason did not attempt to take his testimony as he did that of Erickson, Nelson, and other employees of the appellant, is evident; and the fact that, after Matson had testified concerning the nature of his private examination by counsel, counsel did not attempt to put in any evidence tending to deny or gainsay it, is, to our mind, conclusive of Matson's truthfulness, and hence of the nature of the loop here in question. As appellee's entire case rests directly upon the nature of this loop, this fact would seem to put an end to the case, for it proves conclusively that the wire on the hub of the propeller was not the wire of the dredge.

Upon this testimony of Matson the Court makes no comment, further than to say (p. 1025):

> "The Court, as elsewhere suggested, is unable to rely to any great extent upon the statements of Spencer, *and entertains also some want of confidence in Matson's testimony"*,

but no reason is shown for this alleged want of confidence, and we confidently assert that no valid reason *can* be shown.

Matson's testimony was taken by deposition, and the question of his credibility is presented to this Court on precisely the same basis as it was presented to the Court below.

The foregoing considerations respecting his private examination by *counsel for appellee,* long before the trial, would, as we have already suggested, seem to clinch the inherent evidence of truthfulness which the testimony itself discloses.

We respectfully call attention to the Court's reasoning upon this subject, beginning at the bottom of page 1017 and concluding on page 1025, and beg leave to point out that there is not a single piece of evidence there referred to, which would in anywise warrant the throwing aside of this direct testimony of Matson's concerning the nature of that loop.

The Court in its reasoning is compelled, first, to adopt the testimony of witness Morse as to the method used in fastening a swinging wire to an *anchor,* but he overlooks the fact that to fasten a wire to a fluke of an anchor requires a very different loop from what is necessary to throw it over the buoy and engage the buoy chain. The anchor fluke requires a running noose, so that the loop may draw tight to the fluke; otherwise, it would not remain upon the fluke. The buoy chain requires no such loop, because when taut, the bend of the chain will engage the loop. or if it should draw to the

buoy, being a can buoy, it would lie in the bend and also engage the loop. Moreover, to disengage the wire from the anchor the anchor is drawn home, so that the wire is disengaged on board the dredge, but it would be impossible to disengage a loop from the buoy if it be drawn close about the buoy chain. That would create the necessity of special appliances to take up the buoy, as was done by the workman who prepared the wire on Buoy No. 1 for examination. The inference, therefore, that because a running noose was found upon the anchor fluke, a like noose was put about Buoy No. 2, is not such an inference as would warrant a finding against the testimony of Spencer and Matson concerning the nature of such loop about Buoy No. 2.

The Court next takes into consideration the nature of the loop found on Buoy *No. 1,* and here an additional difficulty presents itself, for there is *a conflict in the testimony of the libelant's witnesses* respecting the nature of that loop, which conflict the Court disposes of as follows:

> "The Exhibits L and N were drawn by counsel for the claimant on the cross examination of libelant's witnesses Polulu and Faria and were accepted by such witnesses. * * * Mr. Lyle drew his own diagram (Exhibit 13), which is a circumstance in favor of its accuracy and tends to outweigh a diagram made by counsel and accepted by a witness who, as in these cases, may be said to have been at a loss for words clearly to state what they wished to describe" (p. 1023).

With respect to this comment, let it not be lost sight of that the witnesses in question were under *cross-examination.* Whether the suggestion that the witnesses may

have been at a loss for words clearly to state what they wished to describe, be well founded, or otherwise, that surely has no application to *a diagram* which they could *see* for themselves, and which they accepted as correct (Rec. pp. 885-889). In fact, Faria did *not* accept the *first* diagram presented to him, but made a correction in it when it was shown to him. He was asked:

> "Q. Now, does that indicate properly the way in which that was made fast?
> "A. Yes, sir, *but this rope goes through the ring, the wire rope goes through the ring and then make it fast*" (p. 899).

The diagram was then *corrected to correspond to his idea,* and he is asked:

> "Q. Now is that right?
> "A. Yes, sir.
> "Q. That is the way, is it?
> "A. Yes, sir."

The Court then asks:

> "And that is the end of the chain, no more chain?
> "A. No, sir, no more chain.
> "Mr. FRANK. No more chain and no buoy?
> "A. No buoy, no, sir."

The diagram is then offered in evidence (p. 899).

That does not indicate that the witness was at a loss for words clearly to state what he wished to describe. He did not accept the diagram drawn by counsel, but corrected it to suit his own idea. Moreover, the Court's participation in the examination, is strong evidence that the witness was not misled in what he wished to say.

So we contend that the Court gives no satisfactory reason for discriminating between *libelant's conflicting witnesses* upon the subject under consideration, and by no just rule of evidence can it be said that the libelant has established the nature of the loop found upon Buoy No. 1.

The Court seems insensibly to have appreciated that condition, for it proceeds by assuming conditions which it supposes *might have been produced* by the great force of the propeller which produced the entanglement, and indulges in theories of how it *might have happened,* and concludes:

> "Either of these theories accounts reasonably for the condition of the coil as found by Lyle and Domei" (p. 1024).

More than this: the foregoing reasoning is only an attempt to identify the loop found on the hub of the propeller with the kinds of loops exhibited in Libelant's Exhibits 7 and 13; but 7 is the Morse loop on the anchor, concerning which we have already commented, while 13 is the Lyle loop on Buoy *No. 1.* To identify either with the loop on Buoy *No. 2,* is an indulgence in an inference not warranted by any testimony in the record. Yet it is by that inference alone upon which the Court attempts to nullify the direct testimony of Matson above referred to. We submit that even if such an inference were logical, which it is not, it could not prevail against unimpeached testimony to the contrary.

We leave this subject to the consideration of this Court. If we be right, as already suggested, it is conclusive against the steamer.

D. *The swinging wire of the dredge attached to Buoy No. 2 was 700 feet long, while the wire found on the propeller was but 100 feet, or, as calculated by the District Court, 140 feet.*—The foregoing admitted facts make it necessary for the steamer to show *affirmatively,* that *part* of that swinging wire *was* taken up before the accident, because with only 140 feet out of 700 feet accounted for, the inference seems certain that it was *not* our wire.

This proof they have failed to make.

In the opinion the following appears:

> "Captain Nelson testifies that the line from the dredge to the buoy was taken apart and the section attached to buoy 2 dropped,—*which corresponds to the allegation of the amended answer,* and the other part fastened to an anchor for swinging the dredge, but eventually taken up, as the anchor dragged (Nelson, pp. 90-91), and the line carried to the Kinau Wharf (Id. p. 91). When the line was taken apart, the section attached to buoy 2 was dropped to the bottom of the harbor. Spencer, in his testimony, makes no reference to this incident narrated by Captain Nelson, but confines his testimony on this point to the one statement that the line,—obviously meaning the whole line with the loop attached, except the end remaining attached to the dredger,—was taken up because they needed it, being a long line. It may be that his memory related to the using of the part of the line which Nelson says was attached to an anchor, as he states they needed the line because it was a stronger one for swinging the dredge. Taking Nelson's testimony on this point with Spencer's, *it seems probable* that the long wire mentioned by Spencer as 'needed', was this part of the swinging wire to buoy 2 which Nelson says they separated from the remaining section attached to buoy 2, and fastened to an anchor as a new swinging

line. *There is no evidence in the whole case which refers to the removal of the section left attached to the buoy and dropped to the bottom of the harbor, when the line was taken apart,—no evidence showing that that section left attached to the buoy was ever picked up, except Spencer's statement that he removed the line because they needed to use the longer line, and his statement that he took it up himself* (p. 17)." Rec. pp. 1008-9.

The admission that "there is no evidence in the whole " case which refers to the removal of the section left " attached to the buoy and dropped to the bottom of the " harbor, when the line was taken apart * * * ex- " cept Spencer's statement that he removed the line", etc., leaves the question open as to *how much* of the line was taken in at the time referred to by Nelson. On this subject there is also no proof *in favor of the libelant.* Such proof as there is, is entirely in favor of the dredge.

The wire attached to Buoy No. 2 was used on November 5th to November 6th (Rec. p. 367). Then a swinging wire attached to the anchor was substituted (Rec. pp. 367-8). It was used about 4 hours in the morning of November 6th. Then it was disconnected and a wire run over to one of the wharves, Kinau or Kekaunaoa. When the anchor was used, the line running to Buoy No. 2 was disconnected and buoyed. *Nelson does not know how many feet of the pennant was left on the buoy* (Rec. p. 378). But when a wire is so disconnected, " we only *retain the end connected with the dredge;* " that is *only 50 or 100 feet long* outside the cut line" (Matson, Rec. p. 530, Ques. 24, 25 & 26). This would

leave near 600 feet attached to the buoy. "We had " probably 3 or 4 pennants into the anchor" (Rec. p. 379). "When this anchor was driven home, we got our " shackle into the shiv, and naturally we would not be " able to take a full cut, which is 200 feet wide, and " we had to get something else out to hold, so we had " to disconnect from the anchor, and we connected onto " a wire which was fast, either to Kinau or Kekaunaoa" (Rec. p. 379). In other words, the wire to the anchor was too short—it would not swing the dredge 200 feet, and so they ran one to Kinau wharf *in order to get a longer one out. This is when the long wire was required and when the wire attached to Buoy No. 2 was taken up.*

The foregoing testimony not only destroys the criticism of Spencer's statement that he remembers taking up the wire from Buoy No. 2, "because they needed a long wire", but the circumstances related by Nelson in that connection are strong corroboration of Spencer's testimony to that point.

Besides, if the wire had been taken up *to* the loop, there is no reason why the loop alone should be left. Nothing remained, under any theory of the nature of the loop, but to open the shackle, which is the same operation as would be necessary to detach the wire at any other point. Having it in hand up to that—the last point—it seems a forced assumption to assert, that it would then be let go to be picked up later.

Whatever view is taken of these circumstances, there is no *proof* that the wire was taken up to the loop and the loop dropped. As the affirmative of that proposi-

tion is with the libelant, there is no proven fact upon which to base an inference contrary to the inference arising from the difference between the length of wire admitted to have been attached to the buoy and that found on the propeller.

E. *The dredge had entirely completed her work in that part of the harbor, and had removed to the outer harbor before the accident to the "Siberia".—It was usual, in the operation of the dredge, to pick up its wires as the machine shifted* (pp. 530, 533-4-5).

These facts fairly lead to a presumption that the wire in question had been taken up.

F. *There were other wires on the bottom of the harbor and other vessels attached to Buoy 2.*—We have not made exact proof regarding other vessels being attached to the chain of this buoy by a wire rope with a loop, but we have proved enough to make it at least probable, and, with a case on the part of the appellee built up entirely of presumptions and inferences, strong probabilities are entitled to their weight in the impeachment of the worth of those presumptions and inferences. That other wires were on the bottom of that place is proved beyond dispute; that the purpose of the buoy was to permit vessels to make fast and pull out from the wharf is admitted; that other vessels were laid up and moored there is also admitted. Alone it remains to prove that they were actually moored to this particular buoy by a cable around the chain. To this point there is the testimony of Miller. That some of

the witnesses *never knew of a vessel attached to the buoy chain by a wire* is negative testimony of no value.

But, whatever be the issue in this connection, the circumstances just adverted to, in the light of those positive ones before mentioned, are entitled to consideration.

We were not called on to account for the wire which was picked up,—to show where it came from. It was sufficient that that wire did not answer to the description of ours, and more than sufficient if we show *possible ways* in which it may have become attached to the buoy.

Rule for Weighing Circumstantial Evidence. — In concluding this phase of the case, we turn for a moment to the law affecting proof by circumstantial evidence. Appellee's case, such as it is, is built upon circumstantial evidence, upon inferences to be drawn from proven facts. The inference which the Court is asked to draw is forced and violent. The lone fact that the dredge had used the buoy, added to the further fact that the "Siberia" had picked up a wire attached to the buoy, makes the sole basis for the inference upon which appellee claims its right of recovery in this action. The eye must be carefully closed to the missing steps in the syllogism thus propounded; and not only that, but also the direct counter testimony and counter inferences must be excluded. No better illustration of the fallibility of such reasoning can be given than is pointed out by the fact of the strong counter inferences above alluded to, even though such counter inferences be *only possible*.

The error into which the District Court was led in its reasoning, on what it regarded as the circumstantial evidence in favor of libelant, is well pointed out in

RUPERT v. BROOKLYN HEIGHTS R. R. Co., 154 N. Y. 90,

where the Court says:

> "It is entirely true that a material fact in a civil or criminal action may be established by circumstantial evidence, but the circumstances must be such as to lead fairly and reasonably to the conclusion sought to be established *and to exclude any other hypothesis fairly and reasonably.* It has been said that circumstantial evidence consists in reasoning from facts that are known or proved, in order to establish such as are conjectured to exist, but the process is *fatally vicious* if the circumstances from which we seek to deduce the conclusion depends itself upon conjecture.
>
> "In order to prove a fact by circumstances, there should be *positive* proof of the facts from which the inference or conclusion is to be proven. The circumstances themselves must be *shown* and not left in conjecture *and when shown* it must appear that the inference sought is *the only one* which can fairly and reasonably be drawn from these facts."

Again:

> "It is a settled principle in the law of negligence which it has been said should never be lost sight of, that when the plaintiff's evidence is *equally* consistent with the *absence as well as with the existence* of negligence, the case should not be submitted to the jury since *in such a case the evidence fails to establish the essential fact.*"

Let us apply this rule to the facts of the case at bar.

The prima facie case does *not* prove that we "*left* the wire in the harbor". The circumstance that the "Siberia" picked up a wire attached to that buoy, considered in connection with the nature of the loop and kind of wire found upon the hub of the propeller, let alone the other "surrounding circumstances", does *not* "exclude any other hypothesis fairly and reasonably". It does not "appear that the inference sought is the *only* " one which can fairly and reasonably be drawn from " these facts". On the contrary, "the plaintiff's evi- " dence is equally consistent with the absence as with " the existence of negligence". And hence "the evi- " dence fails to establish the essential fact". It is, however, enough that every other hypothesis is not excluded.

3. Direct Evidence.—The next question that presents itself in natural order, is the *direct* evidence, of which Spencer's testimony is the principal.

Unless, as we have said, Spencer's testimony is to be disregarded on the ground that it was perjured, it is of course conclusive of appellee's case.

While his testimony is by no means our sole dependence in the defeat of the case, the elaborate analysis of his testimony indulged in by the Court below does not, in view of the gravity of such a charge, appear at all convincing to our minds, and we ask, in justice to ourselves and in justice to Mr. Spencer, on an independent examination and scrutiny of the testimony by this Court, that your Honors, in the process of your ex-

amination of this testimony, will note the corroborating circumstances detailed above. If Spencer be perjured, then Matson is also perjured, for the latter corroborates the former in all essentials. We have already indicated our views upon this matter.

In approaching the consideration of this subject it is well to bear in mind the rule suggested by the case of

SOUTHWORTH v. ADAMS, 22 Fed. Cas. p. 845:

> "I do not think the claim that his testimony is a corrupt fabrication is established by the evidence. To justify a settled belief that the statements of the witness are wilfully fabricated, the Court should not rest its judgment *upon possibilities;* it should have strong circumstances and *tangible facts plainly pointing to such a conclusion.*"

The principal facts relied on to discredit Spencer are:

a. The fact that the loop *found on Buoy No. 1* is *different from* the loop claimed by Spencer and Matson to have been *placed on Buoy No. 2,* going into details respecting shackle, pins, etc.

b. The controversy respecting the shallowness of the water in the vicinity of the wire leading to Buoy No. 2.

We think we have sufficiently treated the question embraced in the first proposition in our consideration of the nature of the loop on Buoy No. 2, and of the testimony attempting to identify the wire on Buoy No. 1 as the wire of the dredge. As we have indicated, libelant's own witnesses disagree as to the nature of the loop around Buoy No. 1, while the entire evidence respecting Buoy No. 1 is collateral and in no sense a direct con-

tradiction of Spencer's testimony respecting the removal of the wire from Buoy No. 2, or the kind of loop there used.

A fair illustration of what was supposed to be direct contradiction of Spencer is found in the testimony of Campbell. Spencer testifies that he "*believes* it was a nut" (Rec. p. 467) by which the pin in the shackle on Buoy No. 2 was made fast. Campbell admits that the nut is a possible condition, but says *he does not keep such shackles in stock* (Rec. p. 788).

Being a possible condition, the fact, if it be a fact, that a different condition was found on Buoy No. 1, or that Campbell does not carry it in stock, is no contradiction of Spencer's testimony as to the condition on Buoy No. 2, even though he had expressed it as a conviction, instead of a belief. And further, whether Spencer be correct or mistaken regarding a nut or a key, the nature of the fastening of the pin does not affect the nature of the loop.

So, too, with respect to the clamps. Spencer says they used clamps very seldom, but most generally spliced the eyes (Rec. p. 481). In this instance he does not know whether there were clamps or not (Rec. pp. 466, 468, 481, 482). How then, do Fuller, Holloway, Klebaum and others, who saw clamps on Buoy No. 1, "directly contradict" him?

We have sufficiently commented on the testimony respecting the kind of wire on Buoy No. 1 in its relation to the kind of wire on Buoy No. 2. If the wire on Buoy No. 1 was in fact the wire of the dredge, Keawe's un-

supported statement alone stands against Spencer's *corroborated by testimony respecting the kind of wire commonly used on the dredge.* Aside from Keawe's innate weakness, this should determine the issue.

Respecting the controversy as to shallow water, it does not necessarily follow from the testimony of Monaghan and the little boys, that Spencer's testimony is untrue. They were not in the same boat with Matson and Spencer; the inattention of the little boys is attested by their own testimony, and their liability to err is too patent to allow their testimony to be the basis of a charge of perjury (Rec. pp. 760, 761, 762, 764, 765, 770, 771, 773, 774, 778, 779, 780.

The testimony of Monaghan on the point of what the dredge was doing when the launch went out is to be noticed as conflicting with that of Nelson (Rec. pp. 744-5-6-7). Moreover, he too was engaged in propelling the launch, and was certainly not giving the same attention to the position of Matson and Spencer as they themselves were. This testimony shows that the launch remained on the town side of the buoy. The pontoon carrying the wire must necessarily have passed closer than he.

Now, the testimony of Spencer and Matson is to the effect that they ran the pennant *along the edge of the island indicated on the map by shallow water* (Rec. p. 522).

An attempt is made by libelant to *so locate the dredge* while at work by means of the wire attached to Buoy No. 2 *as to throw the line of the wire off from the island*

and into deep water. No reliance can properly be placed on that testimony, because *the location of the dredge itself* is necessarily *inaccurate,* being *estimated* distances by the several witnesses. *So, also, the location of the buoy is in doubt,* for no two of the witnesses locate it in the same place. See the points at end of red arrows marked F., L. and T. on claimant's Exhibit No. 2 (p. 1092). These marks indicated the positions of Buoy No. 2 as fixed by Fuller, Lorentzen and Tripp respectively.

On the other map, the position of Buoy No. 2 was fixed by Lorentzen, and the examination of *all the witnesses for appellee* upon the question of deep water *is based upon that location* (Rec. p. 818). *But that was only a guess of Captain Lorentzen, and he so testifies.* When locating Buoy No. 2 on the blue print, he says the only thing he could go by was the Likelike wharf. "The buoy was *about* on a line with this little short cut on the Waikiki side" (Rec. p. 868). With this as a guide, the witness put a dot on the map, saying: "I " should think it would be *about* there, according to the " draft of the water" (Rec. pp. 868, 869).

> "Q. You are going by the draft of the water?
> "A. That is all I am going by. I have no way of measuring it there. I locate it there because I saw the figure 24" (Rec. p. 869).
> "Mr. McClanahan. Q. How far Mauka from the reef or shoal water was the Buoy No. 2 in its original position?
> "A. I could not tell; I never measured it.
> "Q. Can you approximate that?
> "The Court. Answer yes, or no.
> "A. I don't think I could, except whether it was 100 feet or 500 feet, not anyways near.

"Mr. McClanahan. Q. Can you do so within 50 feet, was it 50 feet from the shoal?

"A. I should say it was between 100 and 150 feet. Of course this is not absolutely sure, because, as I said before, I have never measured it."

Recross Examination.

"Mr. Frank. Q. As a matter of fact, Captain, you don't know anything about the distance except the mere guess you are making?

"A. A mere guess, because hauling a vessel down there we don't go by the buoy, we go by the draft of the vessel.

"Q. Then, when you name this distance, you don't know anything about it except that you are guessing. Is that right?

"A. That is all." (Rec. p. 871.)

What reliance can be placed on such testimony, when we remember that on the small scale of those maps a slight variation in the location of either termini would so change the angle as to make a great difference in the location of the wire.

Is that testimony upon which to convict two men of perjury?

The testimony, however, of these men who laid the wire is *corroborated by the only man called on behalf of the appellee, who has anything like an accurate knowledge of the location of the buoy,* and that is the witness Tripp. This is the man whose duty it was to anchor vessels out there. He insists that, though Buoy No. 2 in its original position lay in about 24 feet of water, it nevertheless lay *in a bight with shoal water running out beyond it* (Rec. pp. 810, 811, 816, 812).

The witness says (Rec. p. 812): "There is a point " runs out. The Mokulii would not have more than

"two feet; this is the Mokulii here [pointing]. The "buoy was lying in a little bight at a point outside that "shoal water." He is shown the map, Appellant's Exhibit "E", and asked to make the point where Buoy No. 2 would have been in its original position (Rec. pp. 815, 816), and says: "I don't see that bight in here at all— "where the buoy lies there is 24 feet of water on the "point running outside of here; I don't see it." He then makes a point indicated by the arrow "T", and says: "That is where I think, but the bight don't look "hardly natural. The bight may have been shorter so "that the buoy is further in."

> "Q. And the shoal water further out?
> "A. Yes; the Mokulii lay that way, stern in shoal water, and her bow in deep water."

An examination of the map shows a bight with a shallow jutting out between the location of the buoy and Bishop's wharf, as shallow as 1 5/10 feet.

> "Q. That would be shoal water indicated here next to the buoy?
> "A. That might be, the white line might be and it was shoal outside. We could run down with a ship to that white mark. It is about 400 feet from the lighthouse to that buoy when it was natural" (Rec. pp. 816, 817).

Thus *the testimony of Captain Tripp corroborates Spencer and Matson with respect to shallow water,* for, with the buoy in the bight, there is no improbability in their story that they passed over this shallow strip. Neither of them places the buoy itself in shallow water. Spencer says (Rec. p. 469): "It was pretty deep there." "I don't know how deep it was."

The depth or shallowness of this water has no other significance except this attempt to show that Spencer was wrong on a purely collateral fact.

Such is the evidence brought forward to discredit Spencer.

We feel that in this discussion we have given it more attention than its importance warrants. There is certainly nothing here present that would warrant the Court in finding both Spencer and Matson to be perjurers. Such a conclusion must rest upon naught but questionable "possibilities" upon which, as we have seen, the Court is not justified in placing its judgment that "the statements of the witnesses were wilfully fab- " ricated" (SOUTHWORTH v. ADAMS, 22 Fed. Cas. p. 845).

In addition, however, we feel confident that, not only have we shown the statement of the case against these witnesses to be utterly groundless, but that the witnesses are corroborated and strengthened, first, by some of the very facts urged to their discredit, and, secondly, by the conclusive logic of the "surrounding circumstances" hereinbefore considered.

We respectfully submit, that upon the foregoing showing Spencer's and Matson's testimony is not discredited. But, even if it were, under the remaining evidence the judgment should still have gone in favor of the defense.

We now pass to the second matter involved in this appeal, to wit:

II.

IF THE WIRE OF THE "SIBERIA'S" PROPELLER WAS THAT OF THE DREDGE "PACIFIC", WAS THE DAMAGE COMPLAINED OF A PROXIMATE RESULT OF THE NEGLIGENCE OF THE APPELLANT, OR OF THE NEGLIGENCE OF THE APPELLEE?

On this question of damages we think the Court has also fallen into grave error. Let us follow its finding of facts and conclusions:

It is first found, that immediately on fouling with the cable, the steamer proceeded out of the harbor by means of her port propeller, and with the assistance of the steam tug "Fearless", and anchored in the roadstead outside of said harbor. (Rec. p. 1031.)

It will also be noted that in this operation *the propeller involved with the cable was not used.*

The Court further finds that the diver in his work of removing the chain of the buoy, cut a loop of the wire cable which held such chain, and that the steamer proceeded on her voyage to "Yokohama" "with the " ends of the wire cable so severed protruding".

> "That on an examination of the ship in dry-dock in San Francisco after the completion of such voyage, bits of wire, obviously from the wire cable, part of which was wrapped around the propeller shaft-sleeve, *had become involved in the bearings of the shaft* and had entered such bearings so that they were embedded therein, being found in the lignum vitae wood forming a part of such bearings, and that *in such position,* these pieces of wire, from the revolutions of the shaft *during the voyage,* had caused damage to the lignum vitae and to the shaft itself, so that the shaft subsided slightly in its bearings, causing a diminution of power." (pp. 1031-32.)

We pass by, for the present, the consideration of the slighter damage to the propeller blades, nuts and glands.

The Court proceeds:

> "The question arises whether it was necessary for the 'Siberia' to proceed outside of the harbor and anchor in a seaway at the time of the accident. * * *
>
> "No necessity appears in the testimony for the movement which took place to the outside of the harbor. It was not an emergency under difficult and dangerous circumstances which would excuse a master or a pilot from ordinary cool judgment. The ship was within a few hundred feet from the city wharves and might have been taken there either by warping or the assistance of a tug, or both" (p. 1033).
>
> * * * * * * *
>
> "This ruling as to the unnecessary action of the 'Siberia' in leaving the harbor affects also its responsibility for such injuries as may have resulted by its continuance of the voyage with removing the wire coil from the propeller-shaft. It is clear that this might have been done without delaying the ship more than *two or three days,* if she had remained in the harbor. She took the responsibility of going on without this, and with a protruding end of the coil of wire interfering with the revolutions of the propeller, which, the evidence shows, caused some injury. She is therefore liable for such injury" (p. 1034).

The Court then considers the minor injuries to the blades, the nuts fastening the propeller, and the propeller glands, which injury he attributes, one-half to the act of the libelant, and one-half to the act of the libelee. He then proceeds:

> "The claim is made by the defense that the other injuries which resulted to the 'Siberia' after leaving Honolulu, in relation to the fouling of her propeller, were not the direct result of the fouling but of an intervening cause, to wit: the continuance of the voyage to the Orient and back to San Francisco; and cites SCHEFFER v. R. R. Co., 105 U. S. 249; GOODLANDER MILL CO. v. STANDARD OIL CO., 63 Fed. R. 400, and JENKS v. WILBRAHAM, 77 Mass. 142, in support of its contention. *So far as the continuance of the voyage from Honolulu to Yokohama is concerned,* the point is not well taken, *inasmuch as there are no facilities at Honolulu* by means of which the injuries could have been examined and repaired."

The entire opinion charging appellant with the cost of repairing those injuries, which includes the bill for dockage, depends upon the justification of this finding that "there are no facilities at Honolulu by means of " which the injuries could have been examined and re- " paired", and this finding we challenge upon the record. The very statement of the fact contains the admission that the injuries in question had not yet taken place, for they are injuries that proceeded from "the " continuance of the voyage from Honolulu to Yo- " kohama".

There was, therefore, no such injuries to be "examined and repaired" at Honolulu, and therefore no injuries requiring the facilities which the Court assumes were lacking at Honolulu.

But we make the further suggestion, that there is no evidence in the record from which the Court is justified in finding that "there are no facilities at Honolulu " by which the injuries could have been examined and

"repaired". On the contrary, the testimony of Lyle is directly against it, for he testifies that he could have removed the wire at Honolulu by building staging underneath the propeller, and that it would have occupied him not to exceed three days, and the District Court directly so finds, for it says

> "this ruling as to the unnecessary action of the 'Siberia' in leaving the harbor affects also its responsibility for such injuries as may have resulted by its continuance of the voyage without removing the wire coil from the propeller shaft. It is clear that this might have been done without delaying the ship more than two or three days if she had remained in the harbor" (p. 1034).

Had the wire been so removed, there is no evidence in the record, nor is there any reasonable presumption, that any further damage would have occurred.

The propeller after engaging the wire cable had not made to exceed 23 revolutions, if so many, for it is directly found that there was not exceeding 23 windings of the coil about the tube, and even these 23 windings may have been, and in fact some of them were, double wires made by a single revolution.

Neither does there appear, at this stage of the proceedings, to have been any *stranding of the wire,* while every reasonable inference points to the stranding and working the smaller wires into the lignum vitae as resulting from the cutting of the wire at Honolulu with the loose cut ends in contact with the propeller during the voyage that followed.

But the great damage, as found by the Court, resulted from that stranding.

Speaking of the embedding of the smaller wire into the lignum vitae, the Court says:

> "that, in such position, these pieces of wire, from the revolutions of the shaft during the voyage had caused damage to the lignum vitae and to the shaft itself, so that the shaft subsided slightly in its bearings, causing a diminution of power" (p. 1032).

While the entire necessity for dockage is placed by the surveyors upon the necessity of withdrawing the shaft, so as to repair this damage to the lignum vitae, *all the other damage could have been repaired without docking.* (Evers 325, 326.) Evers is led, on redirect examination, into the suggestion that he would have withdrawn the shaft for examination as to *strain,* but it develops that it was not necessary for that purpose (pp. 328, 329). Even the wearing of the lignum vitae is not shown to have been produced by this accident, but may have been ordinary wear and tear, for which latter reason "in all " steamers it has to be renewed periodically" (Stewart, p. 397). That it did not occur as the mere result of what took place at Honolulu, before the voyage to Yokohama, is made certain by the fact that it could only be the result of long and continued friction (Stewart, p. 394).

But assuming that the foregoing testimony of Lyle and Evers as to the facilities at Honolulu for the *repair* of that damage were not in the record, the Court would still not be justified in making such a finding, for it could then only be based upon the Court's assuming judicial knowledge of the fact, which assumption of

judicial knowledge would be both without warrant or authority.

The determination of that question is based, of course, upon three things, namely, expert knowledge of the repair required, knowledge of the facilities at hand, and expert ability to pass upon the sufficiency of such facilities for the purpose intended. There is no law by which the Court is invested with knowledge of either of these conditions, and assumption of judicial knowledge of the fact thus found, would be unauthorized, even though the evidence above alluded to were wanting in the record. With all deference, we submit that upon this question, the error of the Court is patent.

Following the foregoing suggestion, the Court attempts to fortify his conclusion that the vessel was justified in proceeding on the voyage to Yokohama, by suggesting that

> "that was the course most favorable to appellee in the matter of damages, as the other possible course, —her return to San Francisco for dockage and repairs, would have involved expenses in relation to conveyance of the mails, passengers and freight to their destination by another vessel, with the probable delays incident to such an enterprise, which must inevitably have been far beyond the comparatively minor expenses caused by her own continuance of the voyage" (p. 1036).

But we fail to see how the damage incurred by her continuance of her voyage would have been avoided by her return to San Francisco. In either event she would have been on a long ocean voyage, and it is *that* fact, and not the point of destination, which caused the

additional damage. Neither is there any evidence that the expense of "conveyance of the mails, passengers "and freight to their destination by another vessel" would have been greater than the damages resulting from her own prosecution of that voyage.

But be that as it may, this is a mere "aside", for the proposition still remains that the infliction of such further damage *could have been prevented* by removing the wire from the tube at Honolulu, and then proceeding upon her voyage, which would have entailed a delay only of *three days.*

The assumption of this fact, that there were no facilities in Honolulu to examine and repair the injuries, carries the further injustice, in this,—that the Court in so doing transfers the burden of proof from the libelant to the libelee. It is unwarranted in law, since the burden is on the libelant to prove his damages—"to estab- "lish the amount thereof and that they resulted from "the act of the defendant" (Cyc. 192, and authorities there cited).

It is not only necessary for the plaintiff in an action for damages to establish the fact of the commission of the tort which entitles him to damages, by a preponderance of evidence, but on him rests the burden of proving that the damages he seeks to recover resulted from the tort committed.

Nor is that proposition at all affected, under the facts of this case, by the rule referred to by the Court in its consideration of the question of original liability, viz: that the burden is upon the libelee because the facts

rest peculiarly within his knowledge, for upon this subject, namely, the facilities for repairs at Honolulu, the facts rest, at least equally within the knowledge of both parties, and perhaps more peculiarly within the knowledge of the libelant because of its long use of that port as a calling port for its steamers.

So, too, this question of proof finds further justification in the express finding of the Court that the damage now under consideration was caused by the act of the libelant in the prosecution of its voyage without removing the wire at Honolulu. This finding establishes a prima facie case in favor of the claimant, which called upon the libelant to justify his act of apparent negligence by showing that he had no facilities to make those repairs at Honolulu.

The matter resolves itself into this syllogism: the Court in fact says to the libelant, "You are guilty of " negligence in leaving the harbor without removing the " wire from the shaft of the propeller, and 78 per cent " of the damage is the result of that negligence." If the matter be left to rest there, the libelant cannot recover for the damage. If, however, there be any reason why he was compelled to proceed upon the voyage without first removing the wire,—such as the lack of facilities or impossibility of removing it at Honolulu, the libelant may so show, but the Court cannot come to his aid by assuming the absence of such facilities.

There being no such evidence, but the evidence being in fact to the contrary,—if, as we assert, *the damages in question might have been prevented* by removing the

wire at Honolulu, the expense of dockage and delay, necessitated as it was by the falling of the shaft, must be eliminated. This constituted the greater portion of the damages recovered.

We think the Court gives a convincing illustration of its error in this line of reasoning, when it seeks to split up and apportion the responsibility for the damage done to the vessel in its progress to *successive points* of navigation. The primary cause of damage, to wit, the failure to remove the wire in the harbor, was continuous and never ceased operating from the time the vessel left Honolulu until it reached the port of San Francisco; yet the Court attempts further to discriminate between damage incurred in the progress of the vessel between Honolulu and Yokohama and its progress from Yokohama to Hong Kong and return to San Francisco.

In this connection it again assumes a fact which is not in proof, but so far as there is any proof upon the subject, it is against the libelant, and by the same means as before the Court again transfers the burden of that proof from the libelant, upon whom it properly rests, to the libelee. The Court says (Rec. p. 1037):

> "On this point the question arises as to the liability of the libelant for such injuries as were caused on the return trip from the Orient to San Francisco, for it appears by the testimony of Mr. Beaton, on cross-examination, who was the superintendent of the San Francisco dry dock, that he thinks there were facilities for dry-docking in China or Japan, and that the 'Siberia' had been dry-docked there on a former trip. He is not sure about this, but says, 'I think there are, but I don't know. I am pretty

> sure she was on there. Certainly I don't know, but that is my impression' (Rec. p. 125).
>
> "*Neither side carried this point further.* The above testimony is, to my mind, hardly definite enough to justify the Court in holding libelant to the responsibility for such injuries as may have resulted from the continuance of the voyage to San Francisco without going into the dry dock in 'China or Japan.' ".

The portion which we have italicised discovers the falsity of the reasoning. It must be remembered that the Court proceeds throughout on the foundation of its *finding that the libelant was guilty of negligence in continuing on its voyage without the removal of the wire in the harbor.* Thus it is admitted that the progress of the vessel after the infliction of the original injury was an independent, intervening act of negligence carrying with it, of necessity, its train of consequences.

It is therefore clear that, if the record is barren of any evidence of the existence of dry-dockage facilities in China or Japan, the Court is in duty bound to find that there *were* such facilities, for, if the libelant is to absolve itself from the natural consequences of its negligence in the continuation of the voyage, it has the affirmative duty of adducing evidence showing that the prosecution of the voyage was necessary. Yet in spite of the fact that the testimony of Mr. Beaton must prevail in the absence of any evidence to the contrary (in view of the fact that the evidence was allowed to remain without objection in the Court below), the Court again comes to the aid of the appellee by assuming that there were no dry-dockage facilities *at Yokohama,* etc.

Also, again the Court overlooks its proposition invoked *against libelee*, in the earlier part of its decision, for, since the libelant was in Yokohama, it was in a better position than the claimant to know whether there were facilities for dry-docking at that port. The Court clearly indicates its misapprehension of the rule of the burden of proof in the statement that it makes after dismissing the testimony of Beaton that *"neither side "carried this point further"*. Obviously it was incumbent on the libelant to prove that there were no dry-dock facilities at Yokohama, and its failure to "carry the point further" must necessarily mean its failure to discharge its burden of proof.

In addition to the point that the items of damage included in dockage and delay are directly and immediately attributable to the negligence of the appellee in its failure to remove the wire from the shaft in the harbor of Honolulu, we submit that the evidence of the necessity for dockage is not persuasive.

As a matter of common sense, the opinion of the surveyors as to the necessity for the dockage can be of no weight, unless that opinion was based upon supported facts within the knowledge of the surveyor. For instance, by way of illustration: Stewart and Evers, surveyors, testify that they had the vessel docked, not because of any knowledge of injury to her, but because of the report made by the engineer. Whether that report was true or false, it was the basis of their action. The *ipse dixit* of a surveyor can fix no damages on us. His recommendation or opinion must be based upon facts actually proven, to be of any weight.

By way of an amusing illustration of the ease with which a surveyor will recommend dockage, the expense of which does not come out of his pocket, Stewart calmly states that one item in determining his recommendation for dockage would be "to protect the interests of the "underwriters against possible further damage" (p. 387).

We have already commented upon the ordinary wear and tear of the lignum vitae which necessitates periodical renewal, as well as the lack of strain found on the shaft. The falling of the shaft was not therefore the necessary result of this accident.

One word now as to the manner of assessing damages.

The Court first lays down a general classification of the injuries sustained and divides them into two distinct groups, to wit:

1. The propeller blades; the nuts fastening the propeller, and the propeller glands.

2. The "other injuries which resulted to the 'Siberia' "after leaving Honolulu" (pp. 1035-6).

As to the first class of injuries, to wit, those to the propeller, the nuts and the glands, the Court, invoking a rule of expediency, assesses the damages ensuing therefrom in equal proportions to the parties litigant, and *pari ratione* apportions the charges for the dry dock and delay for the repair of those injuries equally between the parties. The Court finds the number of hours in repairing those injuries and the delay incident thereto

to be *twenty-two per cent* of the total number of hours consumed *in the dry dock and in the delay,* and then divides this twenty-two per cent equally between the parties, i. e., assesses *eleven per cent* of the total charge for the dry dock and for the delay to the *libelant* and *eleven per cent* to the *claimant.*

The *balance* of the cost of repair and per consequence the dry-dock and delay, *seventy-eight per cent* thereof, and that the Court assesses *against* the libel*ee,* notwithstanding the considerations just set forth.

On this branch of the case, and in immediate connection with the preceding, it is to be noted that the treatment of the dockage and delay charges for *painting* shows an equal misapprehension of the relative obligations of the parties litigant. The Court says:

> "The necessity of painting, which develops, was equally an opportunity, as the 'Siberia' thereby escaped the usual dockage charges which would range from $2,256.80 to $4,513.60. This point suggests a wide field of conjecture; for instance, to take one proposition, if the evidence had shown that the 'Siberia' would have dry-docked at such time for painting, would libelant be entitled to dockage fees for more than the surplus time for repairs?" (Rec. pp. 1038-1039).

In addition to the general burden of proof to establish its case in both particulars, to wit: in the proof of the actual commission of the tort and of the amount of the damages resulting therefrom, there is an added reason for imposing upon the libelant the obligation to show that the vessel would not have docked for painting in the natural course of its management. The *means of*

proving the fact of whether it would have dry-docked the vessel anyhow for painting were *peculiarly within the knowledge of the libelant.* This is more particularly clear from the testimony of Joseph Scott Hamilton, which reads thus:

> "A. We have been in the habit of going on dry-dock every *third* voyage.
> "Q. And this was the *third* voyage since any docking had been had by the 'Siberia'?
> "A. Yes, sir.
> "Q. Do you know whether or not it was the intention of the company to place the 'Siberia' in drydock when she returned to San Francisco on this voyage?
> "A. *I really don't know; I wasn't told so"* (the italics are our own).

The appellee certainly was in a position to know whether it would have docked the vessel anyhow for painting, and if it had not intended to dock the vessel for that purpose it should have adduced evidence to that effect, and its failure to produce witnesses competent to testify to the fact leads necessarily to the legal presumption that those witnesses, if produced, would have testified adversely to the appellee. Independently of this consideration, such evidence as there is on the point is adverse to the appellee. From the testimony of the witness Hamilton that the vessel was in the habit of going on the dry dock every third voyage, and the voyage in question was the third voyage since such docking, how could the Court below find otherwise than that the vessel would have been docked for painting anyhow? The burden of proof rested on the appellee for the two-

fold reason that it is the party complainant and that the facts necessary to prove were peculiarly within the knowledge of the appellee. Add to this the presumption of law that prevails with respect to the non-production of witnesses just stated and the testimony of the witness Hamilton, from which one inference should legitimately be drawn, how could the Court below arrive at any other conclusion than that the appellee should bear the painting charges and the dockage and delay charges incident thereto? It is not enough to say that the painting "did " not extend its continuance in the dry dock" (p. 1038). The libelant by its own showing is making a profit of $4513.60 on this item by reason of the accident, for otherwise he would have had to expend that amount. The rule of damages does not allow for the gross loss, but only for the net loss. Indemnity and not profit is its purpose. Hence that item should have been deducted, and not allowed as the "opportunity" of the "Siberia" to "escape(d) the usual dockage charges".

In conclusion, we offer some suggestions on

4. The Testimony Relating to Damages.—We do not think the testimony warrants the finding of the Court respecting the nature of the damage, nor the division made by the Court respecting the time of its occurrence.

We request that it be borne in mind that the primary reason for the dockage was the dropping of the shaft, caused either by the working into the lignum vitae of the wire, through the prosecution of the voyage from

the port of Honolulu to Yokohama, or by ordinary wear and tear. In either event it was worn in by *long and continuous friction* and so caused the dropping of the shaft (see Stewart's testimony, pp. 394-397).

It was this dropping of the shaft which was the main reason for docking, because it rendered the drawing of the shaft necessary.

The damage to the propeller blades could have no bearing. It is ridiculous for the hired experts to attempt to maintain that they could not be removed without docking. Even if it were difficult to operate in the water (which Lyle's and Domei's work seems to refute) a small coffer dam would remove the difficulty.

That damage, it will be remembered, was on the *cutting* side of the blade, while the vessel was *backing* at the time it is contended she picked up the cable. We invite the Court to a careful perusal of the testimony of Evers, and a comparison of it with that of Stewart. The attempt of Evers to make out a case for the appellee is so apparent that comment is unnecessary.

Evers says that they ordered some blades renewed on the propeller; that they were damaged "*the full* "*length* of the blade", "the *full length* of the leading "edges" (Rec. p. 309). And that the blades were restored by *putting in new ones* (Rec. pp. 310, 311). "I "know they did not bring them back because we would "not stand for them."

"Q. They were of some value, were they not?
"A. For scrap.
"Q. Is that all?

"A. That is all; no one would ever put them on." (Rec. p. 311.) "They were badly worn at the root, but they had indentations within two feet of the end" (Rec. p. 318).

But Stewart says:

"I found the leading edges of the *three* propeller blades were chafed and flattened off for about a distance of 18 *inches* from the hub" (Rec. p. 385). "I recommended the propeller blades be taken off and the edges dressed down to a fine edge again" (Rec. p. 395).

Now Lyle testifies that he felt at least one of the propeller blades for its *entire length and found it uninjured* (Rec. pp. 622 and 631).

Lyle's examination was made after the chain had been picked up and before the trip to Yokohama, and thus the fact is fixed that the injury to that blade was *not* done by the chain. Domei found "three blades, every " one of them injured" (Rec. p. 141), so did Stewart and Evers. Thus it is beyond dispute that most of that damage was done *on the trip to Yokohama.*

In addition to the affirmative testimony of Lyle, that at least one of the blades was not injured by the chain, we have the fact that the damage on all three blades was confined to 18 inches from the hub (Rec. p. 385). Evers tries to carry this damage the whole length of the blade, but, as seen from the above quotations, his testimony is so palpably overdrawn as to justify the Court in disregarding it. But even his testimony admits that "they " were badly worn at the root".

Eighteen inches from the hub is precisely the place where the loose end of the wire would strike during the voyage, while, if the chain had done the damage, it would not have been confined to the space about the hub, but would have been more likely to be on the further end of the blade, because of the greater circumference and more rapid motion, and because that would be the first point to pick up the chain.

The possible suggestion that the wire would not be stiff enough to make the indentation would be futile, because the rapid motion of the propeller and the inertia of an ordinarily rigid wire makes as effective a blow as a slower motion against a rigid body. That it so struck the propeller is proved by Domei: "I found " the wire pretty damaged on account of the striking of " the blade" (Rec. pp. 112, 113).

The foregoing considerations, we think, make it conclusive that the damage to the blades and nuts was the result of the trip to Yokohama.

That all of the damage to the shaft, lignum vitae and sleeve was done on the voyage from Honolulu to Yokohama and could have been prevented by the removal of the wire at Honolulu, is made certain by the following testimony of Lyle (Rec. p. 620):

"Cross-Examination.

"Mr. Frank. Mr. Lyle, now before we get to this proposition. As I understand you, this being a twin screw steamer, she has two propeller tubes extending out from each side?

"A. Yes.

"Q. About how long was this propeller tube?

"A. Well, I didn't measure it, but about fifteen feet, I think. I didn't go to measure it, just what I could see.

"Q. This *propeller tube runs about how near to the hub of the propeller?* (74)

"A. *Within about three-eighths of an inch.*

"Q. Three-eighths of an inch?

"A. Yes.

"Q. So the propeller tube thus would *run right up almost to the hub?*

"A. *Yes; the round of the hub goes a little inside of the propeller tube.*

"Q. The end of the propeller tubes goes down, does it not, from the side of——

"A. Where it goes from the vessel it is big and gets to a smaller size at the hub.

"Q. *And passes down over the hub?*

"A. *Yes, there is a cover around there that passes down.*

"Q. You said awhile ago you didn't know what a guard is?

"A. I know what a guard is.

"Q. Did you see that guard there?

"A. No, I seen just that thing that went close to the hub; I supposed that was a guard, but I couldn't see it.

"Q. But you know that a guard must be that portion which goes over the hub, do you not?

"A. Yes.

"Q. Now, when you found this chain and wire wrapped around here—you found it wrapped around this *propeller tube,* did you not?

"A. *Propeller tube;* one part of the *chain* was up over the blade.

"Q. And the chain and wire over the propeller tube?

"A. That's right.

"Q. And the propeller tube and *guard,* so far as you could see, were intact?

"A. *Were intact.*

"Q. When you use the word 'sleeve', 'wound round the sleeve', by that I understand you to have meant this propeller tube?

"A. *Yes, some call it tube, some call it sleeve* (75).

"Q. You know, do you not, that there is a difference between the sleeve and tube, the sleeve being on the shaft itself?

"A. The sleeve ain't on the shaft.

"Q. You don't think it is?

"A. I know it ain't.

"Q. Well, then, *when you speak of the sleeve you do not mean the shaft, you mean the other* [outer] *propeller tube?*

"A. *Yes.*

"Q. And the reason you thought it safe for that vessel to proceed upon her voyage was because this wire was in no wise in contact with the propeller blade, but *it was on this outer tube where, if undisturbed, it could not affect anything at all?*

"A. *Yes, that's right.*"

* * * * * * * * * *

J. A. Lyle (recalled) (Rec. p. 730):

Direct Examination.

"Mr. Frank. Q. Mr. Lyle, you have not seen anybody since this morning's session—nobody has spoken to you about what you were recalled for, have they?

"A. No.

"Q. Now, on your former examination—I will read it up to a certain point and then ask you another question. You testified that the propeller tube runs from some distance back twelve or fifteen feet down to about 3/8ths of an inch of the hub. Do you remember that?

"A. Yes.

Mr. Frank (reading from page 75 of the transcript of the testimony of J. A. Lyle previously given in this case).

"'Q. Now, when you found this chain and wire wrapped around here—you found it wrapped around this propeller tube, did you not?

"'A. *Propeller tube; one part of the chain was up over the blade.*

"'Q. *And the chain and wire over the propeller tube?*

"'A. *That's right.*

"'Q. And the propeller tube and guard, so far as you could see, were intact?

"'A. Were intact.

"'Q. When you use the word sleeve, "Wound round the sleeve," by that I understand you to have meant this propeller tube?

"'A. Yes, some call it tube, some call it sleeve.

"'Q. You know, do you not, that there is a difference between the sleeve and tube, the sleeve being on the shaft itself inside?

"'A. The sleeve ain't on that shaft (171).

"'Q. You don't think it is?

"'A. I know it ain't.

"'Q. Well, then, when you speak of the sleeve you do not mean the shaft, you mean the outer propeller tube?

"'A. Yes.'

"Mr. Frank. Now, I am going to ask you a question and I want you to answer it. And the reason you thought it safe for that vessel to proceed upon her voyage was because this wire was in no wise in contact with the propeller shaft, but it was on this outer tube where if undisturbed it could not affect anything at all.

"Mr. McClanahan. Now, that's not the testimony as appearing by the record.

"Mr. Frank. I know it isn't; I am not proposing it as that.

"Q. Mr. Lyle, don't you understand this is an independent question I am putting to you now?

"A. I understand the question.

"The Court (to witness). He has stopped reading from the record now.

"Mr. Frank. Q. You need not pay any attention to my looking at this, I am asking an independent question. And the reason you thought it safe for that vessel to proceed upon her voyage was because this wire was in no wise in contact with the propeller shaft, but it was on this outer tube where if undisturbed it could not affect anything at all. Is that right?

"A. I could not see where it would hurt the vessel at all.

"Q. You could not see where it would hurt the vessel at all; was it in contact with the shaft or was it on the outer tube?

"A. *I could not see the shaft at all. I never seen the shaft.*

"Q. *Did the propeller tube run down, as I understand you, to the guard, within an eighth of an inch?* (172)

"A. Just so I could get my fingers underneath between the covering, immediately under the hub—*it almost touched the hub.*

"Q. And *underneath that cover, inside, is the shaft?*

"A. The shaft is inside.

"Q. *And this tube and the guard down to the hub were intact?*

"A. *So far as I could see.*

"Q. And the wire was round this *outer shaft?*

"A. Round the *outer shaft.*

Cross-Examination.

"Mr. McClanahan. Q. Counsel brought you to the point where the guard and the shaft extended to a short distance from the hub, and you said that in under there was the shaft itself.

"A. In underneath; yes.

"Q. Do we understand you to say that there was a *wire in underneath there?*

"A. *I could not find any in there; I didn't see any.*

"Q. You spoke of 23 wraps of the wire. Were the 23 wraps on the top of this guard and not down in underneath the guard?

"A. I counted 23; 23 wraps right *on top of the tube.*

"Q. *Would you want to swear that there were no coils underneath in the cavity formed by the guard?*

"A. *I will swear I didn't see any,* OR FEEL *any there; I couldn't tell there was any.*

"Q. You could not feel any there. Could you get your fingers in?

"A. No.

REDIRECT EXAMINATION.

"Mr. FRANK. Q. *Now, the way that was there, the tube coming down (173) within an eighth of an inch, if there had been any wire under there would you have known it?*

"A. I was working on top of the propeller; I had no staging, and so far *as I could feel around, there was no wire in there. I could just get my fingers on the edge.*

"Q. *And all around where you got your fingers no wire had gotten in?*

"A. *No.*

"Q. And it was only an eighth of an inch?

"A. I couldn't say particularly as to the eighth of an inch. It was in the dark and I could just get my fingers between the hub and this guard.

RECROSS EXAMINATION.

"Mr. MCCLANAHAN. Q. If the wire had not got inside the guard, how do you suppose it was caught in order to wrap it up?

"A. I don't know how it got on" (174).

If anything need be added to this, to prove that *at that time* there was no injury to the guard or anything under the guard—which includes every damage except

the blades and nuts by which the blades are fastened—we direct the attention of the Court to the impossibility of a wire cable of the size of the Exhibits here presented, passing through an aperture of 3/8 of an inch, so effectually that Lyle could find no trace of it either on the aperture or underneath.

We think the testimony shows conclusively that, but for the trip to Yokohama, the damage resulting from picking up the wire would have been but nominal,—$40 a day for Mr. Lyle for, perhaps at the utmost, three days. The loss to the ship's time would have been no financial loss, for it appears that, even with the delays that occurred, *she made her round trip on time,* and no demurrage is allowed except for actual loss sustained.

We respectfully submit the matter with the prayer that judgment in this case be reversed.

NATHAN H. FRANK,
IRVING H. FRANK,
Proctors for Appellant.

No. 1866

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit.

THE NORTH AMERICAN DREDGING COMPANY (a corporation), claimant of the Steam Dredge "Pacific", her engines, machinery, boilers, etc. (libelee),

Appellant,

vs.

THE PACIFIC MAIL STEAMSHIP COMPANY (a corporation) (libelant),

Appellee.

BRIEF FOR APPELLEE.

E. B. MCCLANAHAN,
S. H. DERBY,
Proctors for Appellee.

Filed this.....day of October, 1910.

FRANK D. MONCKTON, Clerk.

By.....Deputy Clerk.

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BRIEF FOR APPELLEE.

Owing to the very general character of counsel's statement of this case, and for other reasons not necessary to mention, we deem it will be helpful, to a clearer initial grasp of the facts, to set forth more in detail the salient ones which go to make up the cause of action, as well as to present a brief analysis of the lower court's decision.

Statement of Facts.

The suit is to recover compensation for injuries suffered by libelant's steamship "Siberia" by reason of

fouling in Honolulu harbor a wire cable belonging, as libelant claims, to the libelee, the dredge "Pacific." The "Siberia", at the time, was on one of her regular voyages from San Francisco to the Orient via Honolulu. At about the hour of 5 P. M. on November 10, 1905, she backed out from her berth at Naval Dock No. 2 in Honolulu harbor (see map, Libelant's Ex. 5, III, 1080) and, while performing her usual and customary maneuvers to take her course to the entrance of the harbor channel and the open sea (Lorenzon, II, 554), her starboard propeller fouled the outlying end of a wire cable one inch in diameter, lying at the bottom of the harbor and made fast at its other end to the heavy mooring chain of a government buoy (hereafter referred to as buoy No. 2) located on the side of the harbor opposite the Naval Dock. The cable was picked up while the ship's starboard propeller was moving astern (Lorenzon, II, 572) and was almost immediately, for its entire length of over 100 feet, wrapped tightly around the starboard shaft and sleeve. The resulting strain on the mooring chain parted it below the point where the cable was attached and chain and buoy were drawn to and under the ship's counter almost instantly. The starboard engine was immediately stopped and, it being impossible at the place of the accident to anchor the vessel, because of her size and the narrowness of the harbor channel (Id., 556), it was decided to proceed to a point outside the harbor entrance (to which the ship's head was then pointing), using for that purpose her port propeller and a tug boat which had hold of her at the time. (The facts bearing on the propriety of this decision will be

taken up on the argument.) When the vessel had anchored, a diver was sent for, who removed the mooring chain from the propeller blades and shaft and cut the wire cable where it was made fast to the chain. Buoy and mooring chain were then cleared from the ship, but it was found impossible to remove the tightly wrapped cable from the shaft. The diver, however, reported that this wire on the shaft would do no harm and that the vessel could proceed in safety, despite the fact that the loose protruding ends of the wire might strike the propeller blades when revolving. In consequence of this advice, and after a delay of some seven hours, the "Siberia" proceeded to the port of Yokohama using both propellers without any noticeable effect. except that the starboard engine, *throughout the voyage,* made one revolution per minute less than the port engine (Hamilton, I, 214). Upon the ship's safe arrival at Yokohama, divers removed the cable from the shaft after several days' work, and in due course the vessel reached her home port, where she was surveyed and docked and her injuries repaired. The various items of damage will be referred to later, but it may be here stated, that, except for two demurrage charges, the damages represent actual cash outlays and nothing else.

The dredge "Pacific", which libelant charges as the instrument responsible for the damage, was the property of the North American Dredging Company, claimant and appellant herein, and, under government contract and supervision, was, at the time in question, engaged in dredging the harbor of Honolulu, such work having been commenced on *November 3rd,* 1905, and

continuing well into the year 1906. The "Pacific" was an ocean going steam vessel and, when dredging, was operated by means of "spuds" to facilitate her forward movements and "swinging wires" to facilitate the lateral movements of her cutter. These so-called swinging wires are steel cables, one inch in diameter, affixed to either side of the dredge's cutting paraphernalia and, extending outward, are made fast to some fixed object off the dredge, such as an anchor, buoy, wharf, pile or dolphin. In the swinging of the cutter these cables are alternately slackened and drawn taut, as for instance, —if it is desired to make a cut in a direction off the port side, a stress is put on the port swinging wire, which draws the cutter in that direction and, at the same time, the swinging wire on the starboard side is slackened; while if the cutter's movement is to starboard, the port wire is slackened and stress put on the starboard wire. These swinging wires are made by shackling together pennants ranging 100 feet and more in length and, as the dredge progresses in her work, the swinging wires are necessarily changed from time to time and fixed anew to some more advanced object. We shall not here go into the *evidence* showing the operations of the dredge and the use of her swinging wires during the period in question in this case, as it can better be taken up when we seek to establish the conclusion that the wire fouling the "Siberia" belonged to the dredge. Some reference, however, should be made to the *pleadings*.

The libel alleges that the wire cable fouling the starboard propeller of the "Siberia" was one of the swing-

ing wires of the "Pacific" which had been placed around the submerged mooring chain of buoy No. 2, disconnected from the dredge after its use and allowed to drop to the bottom of the harbor, where the "Siberia's" propeller picked it up. It was therefore incumbent upon the libelant to prove its allegation that the dredge had placed one of her swinging wires round the mooring chain of this buoy. The libel was filed on February 6, 1906, and claimant's answer on March 31st following. Exceptions to this answer were sustained on the ground of evasiveness and on *August 11, 1906,* an amended answer was filed. In this latter answer the claimant *admitted* having placed one of its swinging wires round the mooring chain of the buoy in question, and that it caused "the end of *the section* of the cable *immediately* " *connected* with said anchor chain" to drop to the bot- " tom of the harbor, but it alleged that this sunken end of the wire was *removed* by the dredge before November 10, 1905 (I, 69).

At the trial libelant produced evidence, circumstantial in its nature, tending to show that the wire fouling the "Siberia" belonged to the dredge and could have belonged to no one else, and that it had been negligently left in the harbor. The claimant produced but one witness who testified to the removal of the wire, but offered, however, a multitude of other defenses (as to the lay of the wire, the method of fastening it to the buoy, etc.) tending to show that the wire fouling the "Siberia" did not belong to the dredge.

It should also be stated that exceptions were filed to the libel upon the ground that its allegations did not

disclose a maritime lien upon which an attachment could issue, but this jurisdictional point, though here raised by claimant's first assignment of error, is neither discussed in brief or oral argument and we presume, therefore, that it, together with assigned errors 2, 3, 4, 5 and 6, have been abandoned

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Analysis of Lower Court's Decision.

The decision of the trial court minutely and carefully reviews most of the evidence in the case. For this reaon, in so far as it passes on disputed questions of fact, it is entitled to great weight. After setting out the allegations of the libel and answer, it states the main issue as being whether the wire cable which fouled the "Siberia" belonged to the dredge. It then holds that the claimant, being in *full possession of the facts* and having *admitted* the placing of a wire around the mooring chain of buoy No. 2, should have the burden of proving its removal. It further finds that the dredge was accustomed to attach its swinging wires to buoys by means of loops thrown over them. These preliminary matters being disposed of, the court takes up the evidence of Spencer, the mate of the dredge (the only witness who testified as to the removal of the wire), and clearly shows why his evidence should not be believed. The reasons for this finding will be fully gone into on the argument, but some of them, briefly stated, are as follows:

1. Spencer's *reason for remembering* the removal of this particular wire, to wit: that he needed a *long* wire at the time, had no application to the *short* pennant left by the dredge attached to the buoy.

2. His inability to give the names of any of the men who assisted in removing the wire, or the day, either of the week or month, when it was removed, or to fix the time of the removal of wires from other fixed objects.

3. His evidence as to the course, which he took in going to buoy No. 2 to *place* the wire, was rebutted by many witnesses, and his story of going through shallow water in order to reach it was declared by the court to be "preposterous on the face of it".

4. The contradiction of Spencer by many reputable witnesses as to the *time* of his removal of the dredge's swinging wire from another buoy and the nature of the loop round that buoy (Spencer having testified that *all of the dredge's loops were made alike).*

Under the circumstances, the court found that it could give no weight whatever to Spencer's statements standing alone, and that the question of responsibility came down to circumstantial evidence. The wire found on the "Siberia's" shaft was shown to be *"right lay"* wire, and claimant attempted to show that the dredge was using nothing but *"right and left lay"* wire at the time in question. The court, however, found the claimant's evidence in this respect was weak and that it was satisfactorily proved that the dredge *was* using "right lay" wires. The claimant also attempted to show that the condition of the wire on the shaft was inconsistent with

the dredge's methods of making and fastening its loops and shackles and inconsistent with its use of clamps. Here again, however, the court found that libelant's evidence outweighed that of the claimant and that, in any event, claimant's evidence, taken as true, would not relieve it. The court also found against claimant's contention that it left a *long* wire down, whereas the wire found on the shaft was a *short* one; holding that the amended answer and the evidence in the case established that the line left attached to the buoy *was* a *short* one. The court disposed of the inference advanced in argument that someone else might have attached a wire to the mooring chain of the buoy as too remote and *a wholly unknown use of such buoys.* It then found that the evidence was preponderating to the effect that the wire placed by the dredge over buoy No. 2 was not removed and that it was this wire which was picked up by the "Siberia's" propeller.

Having found that the wire was the dredge's, the court found the authorities harmonious on the proposition that it was *negligent* to leave a cable at the bottom of waters where it might foul ships properly navigating therein.

The court also found that the evidence of Spencer and Matson (another employee of the claimant) tending to show that the "Siberia" backed into shallow water was unworthy of credence and wholly disproved. It further found that there was no negligence on the part of the "Siberia" in her maneuvers before leaving the harbor, and that the attempt of the claimant to show that there was no stern watchman on board had failed.

This brought the case down solely to the question of damages. The court was of the opinion that the injuries to the propeller *blades,* the *nuts* fastening the propeller and the propeller *glands* were caused in part in the harbor by the *mooring chain* and in part by the protruding ends of the wire cable on the voyage to Yokohama. It held that at the time of the accident there appeared no *necessity* for the "Siberia" going outside the harbor to ascertain her injuries, that there did not exist an emergency under difficult or dangerous circumstances and that if the steamer had been warped in to one of the wharves the wire might have been removed from the ship in two or three days and part of the injuries above noted avoided. It therefore concluded that, as to such injuries, the damages should be divided, and that the charge of the Honolulu diver should be reduced from $1,000 (the actual sum paid him) to $40 (his usual charge for a day's work inside the harbor). It was further found that the other injuries should be chargeable solely to the claimant, as there were no facilities for their repair in Honolulu and no sufficient evidence to show that there were proper facilities for docking in Japan or China. It found that the dry-docking charge was equitable, as the nature of the injuries received made dry-docking necessary, and it did not appear that the "Siberia" was unduly detained in the dry-dock, but it also held that a part of this item as well as part of the demurrage incurred in San Francisco should be charged to the libelant, because of contribution through its negligence to some of the

injuries as enumerated above. The bill of the Union Iron Works fortunately segregated the charges for the separate repairs, as well as the time expended on each, and the court held libelant responsible for one-half of certain enumerated injuries the cost of repairs of which aggregated 22 per cent of the whole. Therefore libelant was chargeable with 11 per cent of all the repairs, dockage and San Francisco demurrage. As regards libelant's claim for painting the ship, the court held that while the dry-docking made it necessary to repaint her as the exposure necessarily destroyed the anti-fouling paint, still, as the vessel would have been then or soon thereafter repainted anyway, the charge as against the claimant was an inequitable one. A brief resume of libelant's damages as shown by the evidence and as allowed by the court may be helpful.

	Evidence	Award	
Repairs	$3,442.09	$3,007.36	an
Surveys	300.00	200.00	obvious
Dry docking	15,932.60	14,180.01	mistake
Honolulu diver	1,000.00	40.00	
Yokohama divers	125.00	125.00	
Honolulu demurrage	250.45	250.45	
San Francisco demurrage	3,434.75	3,056.93	
Repainting	1,350.00		
Total	$25,834.89	$20,859.75	

A decree was rendered for the aforesaid sum of $20,859.75, together with interest at 8 per cent from March 12, 1906 (date of amended libel) to the date of the decree, amounting to $6,359.90, and costs, taxed at $941.12, making a total of $28,160.77 with interest thereon at 6 per cent from the date of the decree until satisfied.

Libelant's Contentions.

Libelant presents the following contentions which, it believes, cover the issues raised by the assignment of errors, and certain of its own independent contentions, on the question of damages and contributory negligence:

1. The court's findings on disputed questions of fact are entitled to great weight, especially under the circumstances of this case.

2. The court rightly found that the wire cable which fouled the "Siberia's" propeller belonged to the dredge. (Under this heading we shall discuss the questions raised as to the burden of proof of showing the removal of the wire, Spencer's testimony and the reliance to be placed on it, the length of the pennant left attached to buoy No. 2, the lay of the wire, the nature of the loop and other matters bearing on the question as to whether the wire was the dredge's.)

3. The court rightly found that it was negligent to leave the wire as it was left in the harbor of Honolulu.

4. Libelant's damages amounted to the sum of $25,834.89.

5. The court erred in charging the libelant with contributory negligence in taking the "Siberia" outside the harbor instead of back to the wharf and in proceeding to Yokohama without removing the wire cable from the shaft, and hence its deductions from its award, made upon the ground of such contributory negligence, are erroneous and the award should be increased.

6. The court in any event erred in not allowing libelant the expenses of repainting the "Siberia", in awarding only $200.00 instead of $300.00 for the surveys of the "Siberia" and in awarding but $40.00 for the services of the Honolulu diver.

7. If the court's finding as to libelant's contributory negligence be correct, its apportionment of the damages on the items for repairs, docking and demurrage, though based on correct legal principles, is erroneously computed and the award should be increased accordingly.

We now proceed to the argument and hope therein to make the very complicated facts of the case appear more clear than it has been possible to do in our brief statement of them and our analysis of the court's decision.

I.

THE TRIAL COURT'S FINDINGS ON DISPUTED QUESTIONS OF FACT ARE ENTITLED TO GREAT WEIGHT, ESPECIALLY UNDER THE CIRCUMSTANCES OF THIS CASE.

If there is any rule that is well settled by this court it is that the findings of a District Court in admiralty cases upon disputed questions of fact will not be reversed unless clearly against the evidence.

Whitney v. Olsen, 108 Fed. Rep. 292;
The Alijandro, 56 Fed. Rep. 621;
Jacobsen v. Lewis Klondike Expedition Co., 112 Fed. Rep. 73;

Alaska Packers Assoc. v. Domenico et al., 117 Fed. Rep. 99;

The Oscar B., 121 Fed. Rep. 978;

Peterson v. Larsen, 177 Fed. Rep. 617.

In *Jacobsen v. Lewis Klondike Expedition Co., supra*, Judge Morrow says:

> "The rule has been well established in cases in admiralty in this court, and, as we believe, in the supreme court of the United States, that where the objection to a decision is that it is based upon a fact found by the lower court upon conflicting testimony, or upon the testimony of witnesses whose credibility is questioned, the decision of the lower court will not be reversed, unless it clearly appears that the decision is against the evidence."

It should be remembered in this connection, as said by Judge Brewer in the case of Pioneer Fuel Co. v. *M'Brier*, 84 Fed. Rep. 495, 497, that

> "the court of appeal stands, in respect to admiralty cases at least, not in the old relation of the circuit to the district courts, but rather in that of the supreme to the circuit courts, and any case brought to this court from either the circuit or district court comes here for review, rather than for trial, and whatever limitations or qualifications may be applicable to admiralty cases do not abridge the important fact that this is a reviewing and appellate tribunal."

Bearing these principles in mind, we submit that the decision in the case at bar, so far as it is based on disputed questions of fact, should be affirmed. Almost all of the material evidence on disputed questions, save that of Spencer and Matson for the claimant and Nelson for

the libelant, was heard by the court personally. It is true that libelant took the depositions of many witnesses on the question of damages, but, on the main issue as to whether the wire which fouled the "Siberia's" propeller belonged to the dredge, practically all the evidence was taken in open court. It is also true that the credibility of Spencer's evidence is a vital issue in the case and that Spencer was examined on a deposition de bene esse. It should be remembered, however, that the witnesses who contradicted Spencer were examined in court and that the trial judge had ample opportunity to determine *their* means of knowledge, standing, reliability, etc.

See in this connection dissenting opinion of Judge Gilbert in *Corsar v. Spreckels,* 141 Fed. Rep. at pp. 268-9.

The case at bar is further peculiar in the great volume of the record and the complicated nature of the questions of fact involved. For instance, this court is forced to judge the conditions in Honolulu harbor solely from a recourse to maps and testimony, whereas the trial judge had an exceptionally intimate knowledge of the same. This court will also be forced to weigh the evidence as to the length of the wire left on the buoy, the lay of the wire, the way it was looped, whether the shackle was fastened with a key or a nut, whether Spencer and Matson reached the buoy by going through shallow water, whether it is probable that anyone else in Honolulu could have attached a wire to the buoy, etc., etc. These questions, especially in view of the testi-

mony, were peculiarly questions for the court which tried the case to decide and, amidst the hundreds of pages of conflicting testimony on these points, how is this court to reach as satisfactory a conclusion as that of the trial court, which was familiar with the conditions and had the advantage of hearing most of the evidence?

II.

THE DISTRICT COURT RIGHTLY FOUND THAT THE WIRE CABLE WHICH FOULED THE "SIBERIA'S" PROPELLER BELONGED TO THE DREDGE.

Although we believe that no case can be made out for the reversal of the court's decision on this disputed question of fact, we are constrained in discussing the subject, to go at length into the record and place the case squarely before the court. The subject naturally divides itself into two heads,—first, whether Spencer's evidence as to the removal of the wire from buoy No. 2 is to be believed and, secondly, whether the other evidence in the case leads reasonably to the conclusion that the wire which fouled the "Siberia's" propeller was the dredge's. Preliminarily, however, it is well to refer the court to some undisputed facts, bearing upon our later discussion of these matters, and the conclusions which we seek to establish relative thereto.

The work done by the dredge in Honolulu harbor from November 3 to November 10, 1905, and the various cuts made each day are shown by the map (Libelant's Ex. 5, III, 1080), and the testimony of Nelson, the deck

captain of the dredge. The work began on November 3rd. and the dredge's port swinging wire was then made fast to pile 17 near the harbor lighthouse. On November 4th, her port swinging wire was made fast to a buoy (referred to in the evidence as buoy No. 1) moored close to the lighthouse and several hundred feet away from and seaward of buoy No. 2 (the fastening to both buoys being made by throwing a loop over them down to the mooring chains). On November 5th, the dredge's port swinging wire was made fast to *buoy No. 2* and this wire's *use* continued until some time in the morning of November 6th. After the use of this wire to buoy No. 2 it was disconnected *at the first pennant from the buoy:*

> "Q. Did I understand you rightly when you changed from that (buoy No. 2) to the anchor you simply unfastened the pennants *leaving the portion next to the buoy on to the buoy,* and taking the rest of it and making it fast to the anchor, is that right?
> A. Yes, sir."
>
> (Nelson, II, 378.)

> "This claimant, however, admits that it temporarily caused the end of the *section of said cable immediately connected with said anchor chain* of said buoy to drop to the bottom of said harbor * * *"
>
> (Amended answer, I, 69.)

and the *pennants* so disconnected running towards the dredge were fastened to an anchor, which held the port swinging wire for the remaining hours of that morning, after which, *on account of the anchor coming home,* the swinging wire was run to the "Kinau" or "Kekuanoa" wharf where it was used in the afternoon of November

6th (Nelson, I, 367, 368; II, 369). It was the submerged pennant *left attached to buoy No. 2 on November 6th* which, libelant contends, was picked up by the "Siberia's" propeller four days afterwards.

Nelson's evidence is particular as to the objects to which the dredge's port swinging wires, used from November 3rd to November 6th, inclusive, were affixed, and as to the respective times of their use. The value of this precise evidence becomes apparent when compared with the loose, uncertain and general evidence of Spencer and Matson, to which reference will later be made. It should be remembered also that Nelson was a witness who had peculiar knowledge of the facts to which he testified,—he was the deck captain of the dredge at the time—and his testimony, in so far as it may be found favorable to libelant, should be given great weight for, when it was given, he was still in the employ and under the control of the claimant. It may also be fairly assumed, because of the relationship existing between Nelson and the claimant, that the latter knew, long before filing its original answer (March 31, 1906), that this employee knew that a wire had been fixed to buoy 2. And it is a coincidence worth noting that Nelson's employment on the dredge "Pacific" in Honolulu harbor terminated in the receipt by him of a letter from the claimant's superintendent requiring him to report at San Francisco for work (Nelson, I, 354), at or about the same time that Spencer, the dredge's mate, proceeded to San Francisco and secured employment from it (Spencer, II, 459, 460;

473). It is further pertinent to know that Ericson, another employee of the claimant, whose deposition was also taken by libelant, was promoted from deck hand to mate before he left the employ of the "Pacific" (Ericson, I, 155, 156), and that he was one of the men who put the swinging wire over buoy 2, but, like Nelson, was ignorant of the submerged pennant having been later taken up (Ericson, I, 160).

THE BURDEN OF PROOF AS TO THE REMOVAL OF THE WIRE WAS ON THE CLAIMANT.

This subject should be briefly discussed before referring to the situation which existed when Spencer's deposition was taken. We have seen that the libel charges and the amended answer admits the placing of the dredge's swinging wire over buoy No. 2 and the disconnection of all but the last pennant a few days before the accident, the answer further setting up that this pennant was taken up and removed before the accident. The lower court held that, the libelant being without information relative to the submerged wire's removal, and the claimant being in full possession of all the facts in regard thereto, the latter had the burden of showing its removal. We submit that this conclusion was clearly right.

This is not the ordinary case where the burden of proving negligence rests on the party alleging it, for, in admitting the disconnection of a wire and the dropping of it into the harbor, the dredge admitted itself guilty of negligence under the cases which will later be

cited. No inferences were necessary to establish this and *if* the wire belonged to the dredge, it was clearly liable. The question then becomes solely whether the wire was *left* where it was dropped and this, it was claimed, libelant had not shown. Yet this is a fact resting solely in claimant's knowledge and, if claimant's theory as to the burden of proof be accepted, it would have been necessary for libelant to send down a diver each day to ascertain that the wire was still there. Let us in this connection briefly call attention to some of the facts proven in this case as indicating the extent to which libelant's proof did go.

1. No one besides the dredge was using wires in the harbor at the time.

2. No one else was making use of the harbor buoys at the time.

3. No use of the harbor buoys by fastening wires to their submerged mooring chains had ever been known to men familiar with the use for which they were intended and had been put.

4. The buoy in question had a ring on top placed there expressly for mooring purposes, and mooring to it in any other way would, according to one of claimant's own witnesses, have been a "fool" thing to do (Miller, II, 712).

5. While wires had been picked up before in the harbor, none had been made fast to buoys.

When we consider these facts and add to them claimant's admitted fastening of a wire to the buoy's moor-

ing chain on November 4th, and the subsequent disconnection of a part of it, would any one hesitate to say that the part left remaining and submerged was the wire which fouled the "Siberia's" propeller, *unless* its removal was clearly shown by the claimant before the accident? How libelant could have gone any further with its proof than it did is difficult to see and, even if the burden were on it to show that the wire *remained* where it was dropped on November 6th, the facts above noted clearly tend to meet that burden. But the question of the removal or non-removal of the wire was one on which the claimant had full and plenary proof and on which libelant could not, in the nature of things, have any direct evidence. Under such circumstances, it seems well settled that the onus rests on the party having knowledge of the facts, especially where, as here, the proof of a negative is involved.

In *Great Western R. R. Co. v. Bacon*, 30 Ill. 347, 353, it is said:

> "When the means of proving the fact are equally within the control of each party, then the burden of proof is upon the party averring the negative; but when the opposite party must, from the nature of the case, be in possession of full and plenary proof to disprove the negative averment, then it is manifestly just and reasonable that the party thus in the possession of the proof should be required to adduce it, or upon his failure to do so, we must presume it does not exist, which of itself establishes a negative."

See also

Selma, Rome and Dalton Ry. Co. v. United States, 179 U. S. 560, 567 (35 L. Ed. 266, 269);

20 Am. Dig. (Evidence), Secs. 115, 119;
Lehman v. Knapp, 20 So. 674;
Clapp v. Town of Illington, 87 Hun. 524;
Hoffschlaeger Co. v. Young Nap., 2 U. S. Dist. Court Hawaii, 67, 68-9.

We submit that further argument is not needed to show the correctness of the lower court's conclusion that claimant had the burden of showing the *removal* of the wire.

THE SITUATION WHEN SPENCER'S DEPOSITION WAS TAKEN.

Bearing in mind then that the burden of proof was on the claimant to show the removal of the wire, and that Spencer, brought from his work in Galveston to San Francisco to testify, was the only witness in the case called upon to prove such removal, we think it pertinent to call attention to some of the circumstances existing at the time his deposition was taken.

The date of the accident to the "Siberia" was November 10, 1905. In January, 1906, Spencer left Honolulu and proceeded to San Francisco, where he was examined by counsel for the claimant, who, at that time, was planning to take him to Honolulu to testify in the anticipated suit (Spencer, II, 515, 516). On February 6th the libel was filed in Honolulu, and on March 31st following an answer, drawn by claimant's San Francisco counsel, was filed, exceptions to which were later sustained, the main ground being that it neither admitted

nor denied our allegation of the placing of the wire over buoy No. 2. On April 12, 1906, libelant took the evidence of Domei, the Japanese diver who inspected the "Siberia" and removed the wire in Japan, and whose evidence showed that it was a *"right lay"* wire and that clamps and a shackle were found loose in its *outer wraps* around the shaft. On June 15th the deposition of Ericson was taken by libelant and by this man was shown the placing of the dredge's wire around the mooring chain of buoy No. 2, and that the operation was participated in and witnessed by a man running a gasoline launch with some small boys taking a pleasure ride on it. (All of these called later as witnesses by the libelant.) On August 11, 1906, claimant's amended answer was filed, *admitting* the placing of a wire over buoy 2 and setting up its removal generally before November 10th. Finally, on September 1, 1906, Spencer's deposition was taken in San Francisco which, in addition to showing the removal of the wire, evolved a defense ingeniously incompatible with the evidence of Domei, in that he testified that the wire in use by the dredge at the time in question was *"right and left"* lay wire, and that the loop placed around the mooring chain was such that, if picked up by the "Siberia's" propeller, it would have shown the shackle and clamps on the *inner* and not the *outer* wraps of the wire around the shaft.

This man's evidence was the sole direct proof offered by claimant of the removal of the wire and libelant was forced to meet it by circumstantial evidence and by at-

tacking his credibility. The truth of his testimony hence became the crucial point in the case in the lower court, and for that reason it was and is important and helpful to know the circumstances which led to the taking of his evidence, the situation of the parties and the surrounding facts. The vital fact to which he testified was, of course, the removal of the wire, for, if that were true, then the evidence as to the lay of the wire, the kind of loops used and all else would have become immaterial. We propose, therefore, to first take up the evidence in such of its bearings as will aid the court in a just determination of the weight and credit to be given to Spencer's testimony, not confining ourselves to the reasons advanced by the lower court for disbelieving him. We confess that this argument would seem immaterial, in view of the lower court's express finding on the point, but the case is too important to omit a detailed presentation of the grounds relied upon as discrediting Spencer.

THE FAILURE TO BRING SPENCER TO HONOLULU OR TO CALL OR ACCOUNT FOR THE NON-PRODUCTION OF OTHER WITNESSES AS TO THE REMOVAL OF THE WIRE.

We shall say but little of claimant's failure to bring Spencer to Honolulu to testify. The value of this man's testimony becomes apparent when it is remembered that, from all that appears in the record, his word alone forms the basis of claimant's sworn allegation as to the removal of the wire. No one of the other of claimant's employees called in this case,—Nelson, Ericson

and Matson—knew of the removal of the wire and, apart from these three and Spencer, no member of the dredge's crew testified. Under the circumstances the importance and helpfulness to the trial court of Spencer's personal presence ought not to be overlooked. Not only did claimant fail to bring Spencer to Honolulu, as had been originally planned (Spencer, II, 515, 516), but in January, 1906, he was ordered *away from* Honolulu and his deposition was taken in San Francisco. We do not contend that counsel was not within his rights in taking Spencer's testimony in San Francisco, but, considering its vital importance to the claimant and its inconsistency with the case *previously developed* on the examination of the witness Domei *before the Judge in Honolulu*, the subject forms a fair one for comment.

Much more serious, however, was the failure of the claimant to call the deck hands who, according to Spencer, assisted him in removing the wire.

> "Q. Now, with reference to these pennants on buoys No. 1 and No. 2. Do you remember taking them up?
> A. Yes.
> Q. Who took them up?
> A. I did.
> Q. Took them up yourself?
> A. Oh, no; I had men helping me.
> Q. I mean you superintended it as mate?
> A. Yes."
>
> (Spencer, II, 469, 470.)

Where were these employees of the claimant who helped Spencer to remove the wire from buoy No. 2? There is not one word in the record to explain their non-

production. In the case of *The Joseph B. Thomas,* 81 Fed. Rep. 578, suit was brought for personal injuries in consequence of negligence of those connected with the ship. In the District Court one of the issues seemed to turn upon the question whether one or the other of two young men caused the knocking over of a keg which fell through the ship's hatch and injured libelant. Various witnesses were called and there was a conflict of evidence as to who it was that knocked the keg over, libelant's evidence pointing to one of these young men and the evidence of the ship, given by its second and third mates, to a fellow servant of the libelant. Judge Morrow, in his decision awarding $6,000 to the libelant, says at page 583:

> "On the other hand, it is a significant fact that the two young men, or 'boys', so called, who, it was testified to by the second and third mates, were on board at the time, and were connected with the vessel, were not called by the claimants; nor does it appear that any particular effort has been made to obtain their depositions, although they remained with the vessel until she reached San Francisco, where the depositions of the second and third mates were taken. The captain himself admits that they remained by the ship some three or four days; that they were paid off the third day after the ship arrived. Their testimony would have been most important in dissipating any doubt as to who it was that stepped on the hatch cover; particularly in view of the fact that the testimony of the witnesses called for libelant, while it fails to identify specifically who it was that trod on the hatch cover, indicates that the person who did so was a young man. The very strong inference which naturally arises from this testimony, in view of the testimony produced on behalf of the claimants themselves, that

two young men were attached to the vessel and were then on board, and at the time of the accident were quite close to the fore hatch, is that this person must have been one of the two young men referred to. The failure of the claimants to call these two young men, and the explanation sought to account for this failure, are unsatisfactory, and do not dispel the presumption raised against the claimants, that the testimony of these witnesses, if produced, would have been unfavorable. This is a well settled rule of evidence, not only in civil, but also in criminal, cases. As was well said by Lord Mansfield in Blatch v. Archer, Cowp. 63, 65:

"'It is certainly a maxim that all evidence is to be weighed according to the proof which it was in the power of one side to have produced, and in the power of the other side to have contradicted.'

"Mr. Starkie, in his work on Evidence (volume 1, p. 54), thus lays down the rule:

"'The conduct of the party in omitting to produce that evidence in elucidation of the subject-matter in dispute which is within his power, and which rests peculiarly within his own knowledge, frequently affords occasion for presumptions against him, since it raises strong suspicion that such evidence, if adduced, would operate to his prejudice.'"

And in *Gulf, C. & S. F. Ry. Co. v. Ellis,* 54 Fed. Rep. 481, 483 (cited with approval by this court in *Pac. Coast S. S. Co. v. Bancroft Whitney Co.,* 94 Fed. Rep. 180, 198), the court says:

"Now, it is a well-settled rule of evidence that when the circumstances in proof tend to fix a liability on a party who has it in his power to offer evidence of all the facts as they existed, and rebut the inferences which the circumstances in proof tend to establish, and he fails to offer such proof, the natural conclusion is that the proof, if produced, in-

> stead of rebutting, would support, the inferences against him; and the jury is justified in acting upon that conclusion."

Now, in the case at bar, it seems to us too plain for argument that, if a single deck hand could have corroborated Spencer, pretty good care would have been taken to have kept an eye on the man and his evidence would have been produced. Of course, it is not necessary in a case to call *every* witness on a given subject. Counsel, in the lower court, contended that the evidence of the deck hands would have been "weaker" than that of Spencer and that it is only necessary to produce "the " best and most reliable witness". But in the case at bar the proof of the removal of the wire was *the* vital point at issue and, if Spencer's evidence is "better" and "more reliable" than that of the deck hands, we do not think it will redound to claimant's benefit, for Spencer must certainly strike this court as a very weak vessel to establish claimant's main defense. The proposition of bringing the witness, Matson, all the way from Galveston, Texas, to testify as to the "lay of the wire" and "loop" propositions, and to corroborate Spencer on the "shallow water" claim, is astounding, when contrasted with the strange disappearance of the deck hands whose testimony as to the *removal* of the wire would have rendered unnecessary any evidence as to "wires" and "loops". To say that more evidence would not have been put on as to the removal of the wire, if there was such evidence, is glaringly absurd, and we think we can safely assert that the evidence was not produced, *because it did not exist.* We submit that the failure to

call these deck hands makes strongly against claimant's defense that it removed its wire from buoy No. 2 before the accident.

SPENCER'S TESTIMONY,—ITS WEAKNESS,—AND REASONS WHY IT SHOULD NOT PREVAIL.

We are now brought to a discussion of Spencer's testimony itself as embodied in his deposition. At the start, the attention of the court is called to its generality and indefiniteness, except as to such facts as are important to the defense. Spencer swore positively to the removal of the wire, and libelant was forced to meet this direct statement by showing its innate weakness, and by proof of the surrounding circumstances and collateral facts bearing on his veracity. In *Holmes v. Goldsmith*, 147 U. S. 150, 164 (37 L. Ed. 118, 123), the court says:

> "As has been frequently said, great latitude is allowed in the reception of circumstantial evidence, the aid of which is constantly required, and, therefore, where direct evidence of the fact is wanting, the more the jury can see of the surrounding facts and circumstances the more correct their judgment is likely to be. 'The competency of a collateral fact to be used as the basis of legitimate argument is not to be determined by the conclusiveness of the inferences it may afford in reference to the litigated fact. It is enough if these may tend, even in a slight degree, to elucidate the inquiry, or to assist, though remotely, to a determination probably founded in truth.' Stevenson v. Stewart, 11 Pa. 307."

See also *2 Wigmore on Evidence*, Secs. 995, 1005.

We submit, therefore, that, in the determination of the truth of Spencer's testimony, every proper inference to be drawn from the entire circumstances and surrounding conditions should be considered. We suggest that it is not only proper for the court to consider the presumption arising through the failure of the claimant to call any one of the deck hands or account for their non-production, but also, as bearing on the facts sought to be established, the situation of the witness, his relations with the claimant, his incentive to exonerate himself from blame, his powers of memory and accuracy of statement touching matters incidental to the main fact, the improbability of inferences arising from his statement, and contradictions of other material evidence given by him or of *any* statements of facts or circumstances which tend to corroborate, strengthen or lend color to his testimony. In an interesting case, peculiarly pertinent in this connection, the court says:

> "It is undoubtedly the general rule that where unimpeached witnesses testify distinctly and positively to a fact and are uncontradicted, their testimony should be credited and have the effect of overcoming a mere presumption. (Newton v. Pope, 1 Cow. 110; Lomer v. Meeker, 25 N. Y. 361.) But this rule is subject to many qualifications. There may be such a degree of improbability in the statements themselves as to deprive them of credit, however positively made. The witnesses, though unimpeached, may have such an interest in the question at issue as to affect their credibility. The general rules laid down in the books at a time when interest absolutely disqualified a witness, necessarily assumed that the witnesses were disinterested. That qualification must, in the present state of the law, be added. And furthermore, it is often a difficult

> question to decide when a witness is, in a legal sense, uncontradicted. He may be contradicted by circumstances as well as by statements of others contrary to his own. In such cases, courts and juries are not bound to refrain from exercising their judgment and to blindly adopt the statements of the witness, for the simple reason that no other witness had denied them, and that the character of the witness is not impeached."
>
> *Ellwood v. The Western Union Telegraph Co.*, 45 N. Y. 549, 553 and 554.

We offer, therefore, the following circumstances bearing on Spencer's credibility, after which we shall take up his direct contradiction by other witnesses on various material matters, always bearing in mind, however, our contention that the question of Spencer's credibility is settled once and for all by the lower court's decision.

a. Spencer's Relations With the Claimant.—The evidence showed that at the time of his examination Spencer was still an employee of the claimant engaged in the same line of work. He was clearly an *interested* witness.

b. His Duty With Regard to the Swinging Wires.—Spencer was mate of the dredge and, as such, was charged with the duty of placing and removing the swinging wires. If any single employee was responsible for the serious financial loss, which now threatens the claimant, he was the man. This fact shows an *incentive* which cannot be overlooked in testing the witness' credibility.

c. Indefiniteness of Spencer's Testimony as to Dates and the Various Positions of the Dredge, His Inability to Remember the Placing of Other Swinging Wires in the Harbor, His Forgetfulness of the Names of the Deck Hands Who Assisted in Removing the Wire and His Entire Lack of Recollection That a Gasoline Launch Was Used in the Operation of Placing the Wire.—The matters here noted bear directly on the innate weakness of the witness' testimony and directly affect his credibility.

It will first be noted that in his evidence not a single date is given, nor is there a positive statement of exact time with reference to the doing of any material act. Such statements as "it might have been", "it may have been", "it must have been", "I believe", etc., constantly appear throughout his testimony. We refer to a few of these indefinite statements as to time. As for instance, with reference to the *time* of laying the loop over buoy 2:

> "Q. About how long was it before the 'Siberia' backed out on the day that she fouled the chain or cable?
> A. *It might have been* two weeks.
> Q. About two weeks before?
> A. *It might have been.*"
>
> (Spencer, II, 479.)

(Nelson testified that it was placed there on November 5th; the "Siberia" "backed out" November 10th.)

And again with reference to the *time of the loop's removal* from buoy 2:

"Q. Now then when did you remove the loop and the pennant attached to it from Buoy 2?

A. I moved that before the 'Siberia' went out.

Q. About how long before the 'Siberia' went out?

A. Oh, *it might have been* a day or two. *It may have been* more; may be more.

Q. Did you remove that as soon as you detached it from the dredger?

A. No sir.

Q. How long after it was detached from the dredger was it before you removed it?

A. *It might have been* two or three days, I cannot say."

(Id. 491, 492.)

And again with reference to the time the wire to *buoy 1* was detached:

"Q. Was it during the month of November? This accident occurred on the 10th, was it a week before?

A. Yes, about a week I think.

* * * * * * * * * *

Q. So that the loop around Buoy No. 1 and the pennant attached to it that is some sections of the pennant attached to it were lying at the bottom of the harbor from about a week before the 'Siberia' fouled the anchor chain until one or two or three days after the 'Siberia' went out on that occasion?

A. *It might have been a week,* I am not positive."

(Id. 508, 509.)

And again with reference to the *time* of picking up the float at buoy 1:

"Q. About how long was that before the 'Siberia' or after the 'Siberia' fouled a chain in the harbor? * * *

A. That *may have been* one or two or three days."

(Id. 500.)

And again, with reference to the time the loop remained on buoy 1 after it was detached:

"Q. How long did it remain on the buoy after you had detached it from the dredger?
A. I cannot answer those questions.
Q. Why not?
A. *It might be* a day or two,—I could not tell you exactly."

(Id. 491.)

Spencer's indefiniteness as to the dredge's various positions and the dates on which the swinging wires were placed, used and removed, is accentuated by contrast with Nelson's clear and positive statements on those matters.

Spencer's inability on cross-examination to remember the fixing of any other swinging wires inside the harbor and his reason for such inability are also significant.

"Q. Did you ever do any more work with the dredger on the inner harbor after the 'Siberia' went out that night, before you left there?
A. On the inner harbor after the 'Siberia' went out.
Q. Yes.
A. Yes.
Q. Where did you affix your swinging pennants when you were doing work inside the harbor after the 'Siberia' went out?
A. I do not believe I put any pennants out.
Q. You do not think you put any pennants out?
A. I believe I was on the night shift.
Q. During that time?
A. I believe."

(Spencer, II, 507.)

This last inconclusive statement tends to minimize the value of Spencer's entire evidence, for a casual reading of his direct examination leaves the impression that during his *entire* employment, from November to January, he was constantly laying out swinging wires while on the day shift. It seems incredible, having admitted that he did work on the inner harbor after the "Siberia" went out, that during the entire time he was on the night shift. From the evidence just cited one is inclined to limit Spencer's knowledge of the dredge's swinging wires, during his "four months" employment, to the period extending from November 3rd to November 10th. The situation is not met by the contention that his work in connection with swinging wires in the inner harbor, after November 10th, may have been limited because of his happening to be on the night shift at the time, for his cross-examination rebuts such contention as it contains *repeated* general references to his fixing of wires on buoys and wharves and dolphins, and the record shows a paucity if not an entire absence of such in the *outer* harbor.

Still more significant is Spencer's failure to remember the *names* of *any* of the deck hands who assisted in the wire's removal (Spencer, II, 493). If his mind was clear as to the fact and time of removal of this particular wire, can any rational reason be given for his failure to remember at least *some* of the men who assisted in the work? It would seem an improbable mental feat to clearly picture *this* specific act without a recollection of the identity of any of the human actors. And

the situation becomes more improbable in view of the fact that the witness talked with claimant's San Francisco counsel two months after the accident. It is also significant in this connection that Ericson, called by libelant, was one of the deck hands on Spencer's shift (Spencer, II, 513), yet he knew nothing of the wire's removal.

Spencer's failure to remember the unusual and obvious use of a gasoline launch in connection with his placing the wire on buoy No. 2, as bearing on the reliability to be placed on his memory, should also be noted. The fact of the launch's use was testified to by five disinterested witnesses. Spencer can remember going through *shallow water* in order to place the wire (a statement denied by disinterested witnesses and found by the trial court to be "preposterous on the face of it"), but he cannot remember the clearly established fact that a gasoline launch was used in the operation.

It may be said in regard to all these matters that it was but natural for Spencer to have failed in positive statements, because he was testifying to facts of almost a year's standing. (Even if this were admitted the argument would apply with equal strength to his positive remembrance of removing the wire and, should it be said that the accident to the "Siberia" would aid his recollection of *removing* the wire from that particular buoy, why, we ask, did not the accident equally assist him in a recollection of the names of the men assisting in the work of removal, or the *unusual* employment of a gasoline launch in *placing* the wire to that particular

buoy?) But the suggestion is without merit. When we consider the hubbub, which the accident to the "Siberia" caused, the investigation the next morning by Mr. Holloway, Superintendent of Public Works of the Territory of Hawaii, Captain Fuller, the harbor master, and Lieutenant Slattery, the United States Engineer in charge, and their visit to buoy No. 1 where they found another of the dredge's submerged swinging wires (which was thereafter secretly removed), the sending of Spencer to San Francisco and the confidential talk there between counsel and the witness (some time *before* the libel was filed), and the statement made to him at the time that he might be wanted to *testify* later in Honolulu,—lapse of time becomes a weak apology for Spencer's indefiniteness. Unquestionably Spencer and all other men on the dredge were examined in Honolulu at the time of the accident with a view to meeting the situation, and the surrounding events, recent at that time, must have been impressed on their minds. The question of the dates of the removal and fixing of the dredge's wires and the circumstances surrounding them was vital, and the remembrance of one fact would naturally have carried with it the remembrance of the others. And, while it is true that Spencer's evidence was taken nearly ten months after the accident, the libel was filed less than three months after it, and Spencer had been fully examined even before this and was continuously at claimant's disposal thereafter. We do not think it will be claimed that Nelson, also an employee of the claimant, testifying long after Spencer, was falsifying against his employer, and yet Spencer's

memory of events does not contrast favorably with Nelson's.

d. Spencer's Reasons for Remembering the Removal of the Wire From Buoy 2. Herein Also of the Contention That it Was a Long and Not a Short Wire That Was Picked Up by the "Siberia"—These points are of considerable importance and bear not only upon Spencer's credibility, but upon an additional defense set up by claimant in the trial court. It is obvious that if Spencer gives what would clearly appear to be an illogical *reason* for remembering the removal of the wire from buoy 2, his testimony as to the fact of removal is in a measure discredited.

Jefferson v. State, 49 S. W. 86, 89;
2 Wigmore on Evidence, Sec. 995.

The wire found on the "Siberia's" shaft was a *short* one and Spencer's reason for remembering its removal was that they needed a *long* one for the next shift. This *reason* is stated five separate times on cross-examination and a remarkable feature of the matter is that the reason appears as equally applicable to the removal of the wire from buoy 1 *after* the "Siberia" went out as to the removal of the wire from buoy 2 *before* the "Siberia" went out.

"Q. What makes you remember that you took it (the loop on buoy 2) up one or two days before the 'Siberia' went out? What fixes that in your mind?
A. Because we needed it.
Q. What did you need it for?
A. We needed it to shift."

(Spencer, II, 480.)

"Q. What makes you remember *particularly* that you removed the pennant and loop from buoy 1 *after* the 'Siberia' went out, and the loop and pennant from buoy 2 *before* the 'Siberia' went out?

A. Because we needed that wire.

Q. Which wire?

A. The long one from buoy 2."

(Spencer, 492, 493.)

"Q. What makes you so sure that you removed the pennant and loop from buoy 1 *after* the 'Siberia' went out and from buoy 2 *before* the 'Siberia' went out?

A. Because we needed that wire from buoy 2."

(Id. 496.)

"Q. What makes you remember so *positively* the removal of this wire from buoy 1 and buoy 2 as distinguished from the other wires that you put out over dolphins and piles and other buoys in the harbor?

A. What is there about what?

Q. What makes you remember so positively that one was *before* and the other was *after* the 'Siberia' fouled?

A. Because we needed the longest wire at that time."

(Id. 503, 504.)

"Q. And the reason why you removed that (the loop on buoy 2) was you needed the long cable, the long wire that was attached to that loop for swinging the dredge?

A. Yes.

Q. In the position in which it was then working?

A. Yes."

(Id., 504, 505.)

It will be noted that on three occasions out of the five Spencer gives as the reason for his remembrance of the removal of the wire from *buoy 1 after* the "Siberia" went out the fact that they needed the long wire attached to *buoy 2*. This is sublimely ridiculous. The wire from buoy 1 (which, it is significant to remember, remained at the bottom of the harbor from five to seven days longer than was "customary"), was used, disconnected and dropped before the use of the wire to buoy 2 began. It is incredible, therefore, that the need of the submerged "long" wire at buoy 2 should serve as a reason for remembering the removal, days after such need, of the submerged wire at buoy 1.

Equally inconclusive is Spencer's reason for remembering the removal of the wire from buoy No. 2. As already pointed out, claimant's amended answer in this case admits that at the time of the disconnection of the wire from the dredge it caused "the *end* of the *section* of the cable *immediately connected* with said anchor chain" to drop to the bottom of the harbor. This allegation is supported, as has already been shown, by the testimony of Nelson in answer to a direct inquiry on cross-examination:

> "Q. That wire (the one to buoy 2), you said, when you were using it was about 700 feet long?
> A. I should judge it was about 700 feet long.
> Q. But it was made up of quite a number of pennants?
> A. Yes, sir.
> Q. Did I understand you rightly when you changed from that (buoy 2) to the anchor you simply unfastened the *pennants* leaving *the portion*

next to the buoy onto the buoy, and taking *the rest of it* and making it fast to the anchor, is that right?

A. Yes, sir.

Q. About how many feet was the *pennant* that was left on the buoy, do you know of your own knowledge?

A. No, sir, I don't know of my own knowledge."

(Nelson, II, 378.)

According to Spencer himself "a section" (referred to in the amended answer) or "a pennant" (referred to in Nelson's testimony) would be "100 feet or more" (Spencer, II, 468. See also Nelson, I, 367, to the effect that a pennant ranged from 100 to 200 or 300 feet), and it is found by the court that the wire on the "Siberia's" shaft was something a little over 140 feet long (Decision, III, 1020).

These facts were held to have been established by the court and, as a consequence, it found that Spencer's *reason* for remembering the removal of the wire from buoy 2, to wit: that the dredge needed a *long* wire to shift with, had no application to the removal of the *short* wire left attached to the buoy (Decision, III, 1009). The reason given by the witness for remembering the removal of the wire from buoy 2 before November 10th, being in itself inconclusive, tended to discredit the fact to which the reason so inaptly applied.

It might well be that Spencer could remember the *detaching* of the wire on November 6th because of the need of a long wire on that day, but it is irrational to say that this need serves as a remembrance of the subsequent act of removing the *short* wire, disconnected

entirely with any such need. Spencer's reason is so palpably inappropriate, that one is led to the belief that he confused the detachment of the long wire with the removal of the loop itself, and if this hypothesis be accepted we are relieved of the necessity of charging wilful perjury.

In facing the dilemma presented by the foregoing argument counsel, not only in the lower court but also here, takes the position that the claimant only admitted the disconnection of a *700 foot* wire left to the buoy and that hence the short wire found on the "Siberia's" shaft could not have belonged to the dredge. This contention was based partly on the testimony of Matson as to the nature of the loop thrown over buoy 2, which will be referred to later, partly on evidence of the same witness that on disconnection of a wire from the dredge all that was retained was the section connected with the dredge, and partly on Spencer's express statement that he took "the loop" up. It is then pointed out that Nelson did not know how many feet of wire were left attached to the buoy and counsel lays stress on his statement that "We had probably three or four pennants into the an- " chor" (Nelson, II, 379), and his further statement that "When this anchor was driven home we got our " shackle into the shive, and naturally we would not be " able to take a full cut, which is 200 feet wide, and we " had to get something else out to hold, so we had to " disconnect from the anchor, and we connected onto a " wire which was fast either to Kinau or Kekuanoa" (id.). In other words, as counsel put it, the wire to the

anchor was too short and so they ran one to the Kinau wharf in order to get a longer one out and this was when the long wire was required and when the wire attached to buoy No. 2 was taken up. This explanation is obviously labored and theoretical and is entirely inconsistent with claimant's amended answer and Nelson's evidence before cited, showing a disconnection of the wire to buoy 2 on November 6th, leaving *only* the section or pennant immediately connected with the buoy. It seems to us, therefore, sufficient to say that the court found in libelant's favor on this point and that its finding, under the circumstances, is conclusive. However, we wish to leave no argument unmet and will briefly answer the contentions made.

Spencer's evidence that he removed "the loop" is, of course, conclusive, if believed, but we are now engaged in showing cogent reasons why it cannot be believed. Matson's statement as to the custom of disconnecting wires from the dredge is also of little weight, when viewed in connection with the allegations of the amended answer and the express testimony of Nelson as to what was done *on this particular occasion,* but it is nevertheless possible that the wire was first disconnected from the dredge and the remainder then at once taken up, except the last pennant, for use to the anchor (see court's Decision, III, 1008, 1009). Nelson's evidence that the dredge probably had 3 or 4 pennants to the anchor is not in counsel's favor but against him, for these pennants ranged from 100 to 200 or 300 feet, as already pointed out, and the testimony is further in-

consistent with the claim that the wire was only detached at the pennant immediately connected with the dredge. Nor is it true, as counsel claims, that the wire from the anchor was "too short". The point was that the anchor "did not hold" (Nelson, II, 369), and so the line was taken up and connected to another line *already* fast to the "Kinau" or "Kekuanoa" wharf (Id. 399). It could not have been *at this time* that the wire left on buoy 2 was taken up, for the testimony just cited is clearly opposed to any such theory and, in addition, we have Spencer's express statement to the following effect:

> "Q. Did you remove that (the wire to buoy 2) as soon as you detached it from the dredger?
> A. No, sir.
> Q. How long after it was detached from the dredger was it before you removed it?
> A. It might have been two or three days; I cannot say."
>
> (Spencer, II, 492.)

The date of the detachment from the dredge was, as we have seen, November 6th, and Spencer's above testimony is entirely at variance with the present contention that the wire was removed on that date.

We submit, therefore, that not only did the trial court rightly find that Spencer's reason for remembering the removal of the wire had no basis in fact, but that it also rightly found that the wire left attached to buoy 2 was a short one and thus conformed, in this respect, to the wire picked up by the "Siberia". We see no possible basis for a reversal of the district court's findings on these points.

e. Spencer's Irreconcilable Statements as to the Removal of the Loops From Buoys 1 and 2 Respectively.—Spencer testified that he removed the loop from buoy 2 when they went *outside* to buoy 1 (Spencer, II, 489). He was also clear in his statement that when they used the wire to buoy 1 the dredge was going outside (Id. 489, 490). This last statement not only does not coincide with the position of the dredge on the map and as shown by Nelson's evidence, but it is also contradicted by Matson (Matson, II, 534). Assuming for the purpose of this argument, however, that Spencer was correct, it is at once apparent that he gets into hot water when he says that he had removed the loop from buoy 2 when he came out to use the dredge at buoy 1. For, according to his evidence, he dropped the loop from buoy 1 in the harbor about a week before the "Siberia" went out (Spencer, II, 508), and he did not remove the loop from buoy 2 till two or three days after it was detached, as already noted. A situation is thus presented which is impossible of analysis, and Spencer's statements in regard thereto are absolutely irreconcilable. And it cannot be said in his extenuation that he was referring to a second use of buoy 1, for he was asked repeatedly if, having once used a wire, he did not disconnect it temporarily and come back later, pick it up and use it in the same position, and he denied that he had (Spencer, II, 485, 499).

We submit, therefore, that Spencer, on his own evidence, is clearly not to be believed. His testimony is weak, indefinite, improbable and contradictory. We now

pass to the direct contradictions of both Spencer and Matson by other witnesses on *material* matter brought out on direct and cross-examination.

DIRECT CONTRADICTION OF SPENCER AND MATSON BY OTHER WITNESSES, AND HEREIN OF SPECIAL DEFENSES OFFERED BY CLAIMANT TO RELIEVE ITSELF FROM RESPONSIBILITY.

We have thus far dealt mainly with the reasons for disbelieving Spencer's testimony that he removed the wire cable of the dredge placed round buoy No. 2. The argument to follow shows many further reasons for disbelieving him, owing to his direct impeachment on other *material* points. The subject matter now referred to, however, is naturally a separate one from that which has preceded, for the reason that it also deals with facts, apart from the *removal* question, tending to exonerate the dredge and, as to some of these collateral facts (unlike the fact of removal), the evidence of Matson is similar to that of Spencer.

a. Nature of Loops, Clamps and Shackles Used by the Dredge.—It was the endeavor of the claimant in the court below to show that the character of the loops made by it was inconsistent with the position of the wire found on the "Siberia's" shaft, that in making the loops, either no clamps were used or they were used in great numbers, and that the pin of the shackles was fastened with a nut (whereas only one or two clamps were found in the tangle of wire on the steamer's shaft and the shackle found there had neither pin nor nut). Much technical evidence was taken on these points,

which is carefuly reviewed in the trial court's opinion, that court coming to the conclusion that probably the loop was as testified to by libelant's witnesses rather than by Spencer and Matson and that the question of the nut was not very material, but that in any event even the loop contended for by claimant would account for the conditions found on the propeller shaft. In view of the court's conclusion, we do not feel that it is necessary to again go into any extended discussion of the matter, but we shall briefly refer to some of the salient features of the evidence.

According to the evidence of Spencer and Matson, the loops used by the dredge consisted of an entire wire pennant, with eyes at each end brought together and fastened by a shackle with a nut and screw pin. The evidence of both witnesses is clearly to the effect that *all* of the loops were made this way (Spencer, II, 481, 487; Matson, II, 520, 530, 531). Spencer also testified that this was the kind of loop used on buoy No. 1 (Spencer, II, 487, 488, 507, 508). Both witnesses also testified that the eyes were usually made by splicing and not by clamping the wire and that, if clamps were used, a profusion of them were necessary; also, that the pin of the shackle was held by a screw nut (Spencer, II, 467; Matson, II, 520). The diagram, claimant's exhibit 1 (III, 1091), shown to both witnesses *and drawn by counsel,* illustrates claimant's theory as to how the loop was made. Libelant's theory was that the loop was a running noose made by forming an eye at the *end* of a pennant, clamping the

wire for that purpose, putting a shackle through this eye and over the body of the cable and fastening it with a pin. This method is illustrated by libelant's exhibits 7, 12 and 13 (III, 1085, 1086, 1087). The purpose of claimant's evidence as to the loop became obvious as the case progressed. In the first place, it will be remembered that the testimony of Domei, the Japanese diver, showed that he found a loose shackle in the *outer* wraps of the wire, a fact obviously not so likely if the loop was as testified to by Spencer and Matson. In the second place, Lyle testified to only seeing two clamps involved in the wire and Domei in Japan only found one, whereas, if claimant's loop theory were correct, the probabilities would be that either none or a great many would have been found. Finally, the shackle found on the "Siberia" had no pin in it and it was argued that this was an improbable condition if, as Spencer and Matson testified, the pin was made fast with a nut.

Before adverting to the testimony which clearly contradicts and discredits Spencer and Matson on these points, we desire to make it clear that, even if the conditions testified to by them prevailed, it could hardly affect the result of the case. The *nature* of the loop is not necessarily inconsistent with the conditions found on the "Siberia" for, as Judge Dole well says, "Such " a loop may have been used and the clamps creating " it together with the shackle may have been caught in " the coil before a sufficient strain was put on the wire " cable to pull the noose tight, * * *" (Decision, III, 1024). As to the finding of clamps and a pinless

shackle, it is noteworthy in this connection that neither Spencer nor Matson would testify that clamps were *not* used and, if *many* were used, no one can tell what the revolving propeller may have done to them; while, as to the pinless shackle, the court said:

> "Spencer says (p. 14) that he believes the pin was fastened in the shackle by a nut screwed up and Matson corroborates this. This testimony, if accepted, tends to strengthen the defense somewhat, as obviously the pin of the shackle would be more easily displaced by the strain of the fouling of the propeller if fastened with a key than if fastened by a nut; but the court has nothing before it by which it can gauge the power of the terrific strain put on the tangled mass of wire cable and anchor chain and it moreover appears that the clamp which was found in the wrap by Domei (p. 24) had been disconnected from the cable although it had been fastened to it, if at all, by two nuts, and had also been opened out. The court, as elsewhere suggested, is unable to rely to any great extent upon the statements of Spencer, and entertains also some want of confidence in Matson's testimony, yet, if their testimony on this point should be accepted, the conclusion of the court on the main issue would not thereby be affected."
>
> (Decision, III, 1025.)

It is probably unnecessary to go further into this matter; nevertheless we call attention to some portions of our evidence on the point.

Libelant produced the witness, Morse, a man thoroughly familiar with conditions in Honolulu harbor through his work for the government in making repairs there. This man testified to finding in the harbor a wire, which was admittedly the dredge's (Morse, II, 654,

655), attached to a buried anchor. He also showed that this wire was fastened to the fluke of the anchor by means of a running noose (Id., 656; see also libelant's exhibit 7, III, 1085), that there was a clamp on the eye and that the pin of the shackle was fastened with a key (Morse, II, 656, 657). In addition libelant produced numerous reputable witnesses, who visited *buoy 1* the day after the accident to the "Siberia", and testified that the wire there was a *single* one running into the harbor with a shackle and two clamps on it (Fuller, III, 855; Lorenzon, III, 863; Pololu, III, 876, 878; Keawe, III, 918, 919; Klebahn, III, 833; Lyle, III, 942, 943; Holloway, III, 851). Several of these witnesses testified expressly to there being a *running noose* (see especially evidence of Lyle and Keawe) and the witness Pololu testified that there was no "knot" *(nut)* fastening the pin of the shackle (Pololu, III, 876). Moreover, Lyle expressly testified that the wire, shackle and clamps were exactly similar to those which he found on the "Siberia" (Lyle, III, 944). It is perfectly clear that this wire on buoy 1 belonged to the dredge, for claimant had admitted that its wire was there at that very time and no other wire was found on the chain. In this connection the lower court well says:

> "Claimant's counsel have taken the ground in their brief that it is a mere presumption that the wire attached to the chain of buoy 1 was the wire laid there by the libelee. I consider the evidence preponderating in favor of the theory that it was the cable of the libelee. Spencer states that he placed a cable over buoy 1 before the accident and removed it after the accident. When the buoy was raised by the pile driver into the air, a wire cable

> fastened to its anchor chain came up with it. This cable extended out into the harbor channel toward the channel wharf, or in that general direction, and was buoyed at the end by a rope to a stick of wood, which corresponds to claimant's evidence as to its custom and manner of leaving its swinging lines after using them, and the direction the line from buoy 1 was left. If it was not the libelee's cable then the libelee's cable was on the chain at the time, if we accept Spencer's testimony, and could hardly have escaped observation. The suggestion of counsel for the claimant, both in regard to buoy 1 and buoy 2, that some unknown person may have, unknown to any one, placed a loop with a line attached over these buoys, is so unlikely under the circumstances of this case, as to be entitled to little consideration.''
>
> (Decision, III, 1010, 1011.)

It is, therefore, submitted that the testimony of both Spencer and Matson as to the *uniform* method of the dredge in making loops and as to its manner of using clamps and shackles is clearly discredited.

Claimant, however, contended in the lower court that, even accepting libelant's theory that the loop was made by means of a running noose, it would still be impossible to produce the conditions actually found on the ''Siberia's'' shaft. This claim is fully met by the lower court when it says, in discussing *all* the loops testified to by the different witnesses:

> ''However that may be, with the condition of the coil of wire around the propeller shaft sleeve with the shackle and both clamps separated from the wire cable by the great force of the propeller which produced the entanglement, it is not easy to lay down a specific proposition as to the kind of loop which was used, except that it was not a loop made

of a large eye which had drawn so tight that two wire cables must have been around the anchor chain. Such a loop may have been used and the clamps creating it together with the shackle may have been caught in the coil before a sufficient strain was put on the wire cable to pull the noose tight; or it may be, which is more likely, that the loop was according to the description of the witnesses Morse and Lyle, shown by libelant's Exhibits 7 and 13, with a small eye, and that the shackle and clamps became entangled in the coil before there had been strain enough to cause it to slide along the wire into a close loop around the anchor chain. If such is the case, and the loop was about six feet in length, that would produce the condition found by Domei in which there was a piece of wire protruding three or four feet, which he cut off, being a piece of the long wire, and a shorter one protruding about one foot, the shorter one being found to be about six feet long when he removed it (Domei, p. 23). Either of these theories accounts reasonably for the condition of the coil as found by Lyle and Domei. It is more difficult to account for the condition of the coil on the theory of the loop described by Spencer and Matson, for, although the coil was long enough to take up the whole of such loop,—which would be from thirty-seven to fifty feet long,—yet the fact of a short end being found in the coil, strongly tends to support the theory of the kind of loops already referred to and delineated in libelant's Exhibits 7 and 13."

(Decision, III, 1023, 1024.)

In view of the court's elaborate findings on these questions of loops, shackles and clamps, the technical nature of these matters and the conflicting testimony on the point, we do not feel that it is necessary to say more on the subject and perhaps have said too much already. It

is significant that, with a clear method of escape open to the claimant by showing the *removal* of the wire, it should have put on so little testimony on that point and should have devoted so much effort to establish its inconclusive "loop" theory.

b. Kind of Wire Used by Dredge.—Spencer positively testified that the dredge was only using *right and left* lay wires at the time of the accident (Spencer II, 472, 509). He was also positive that the wire on *buoy 1* was right and left lay (id., 500, 501). Matson did not notice the lay of the wire on buoy 2, but he also testified that the dredge was using right and left lay as distinguished from right lay wires (Matson II, 521). The wire found on the "Siberia's" shaft was *right lay* and hence this evidence assumed an aspect of some importance. We think that we cannot do better on this point than to quote in full from the opinion of the court:

> "A very strongly contested point in this circumstantial evidence was in relation to the character of the wire cable found on the Siberia's shaft and that used by the libelee. It is settled by the introduction of libellant's Exhibit 1, which is the piece of wire cable taken from the propeller by the witness Domei in Japan, that such cable was that known as right lay, which is a cable made of strands of twisted wire, seven strands in this case, the wires of which strands are twisted in the opposite direction from the direction in which the strands are twisted. Claimant introduced considerable testimony to show that up to some time after the day of the accident they used for swinging lines to the dredge nothing but right and left lay wire cable, which is a cable made of strands of twisted wires, every other strand being twisted in opposite direc-

tions; that is to say, holding such a piece of cable so that the strands run upwards to the right, the wires composing every other strand are twisted upwards to the right and those of the alternate strands are twisted upwards to the left.

"Spencer swears that the wire used on buoy 2 was right and left lay and that they had no right lay wire on board the dredge and did not use any other kind at that time (Spencer, p. 18), and that all the wire that they used was most generally kept on the dredge and on the pontoons (id. pp. 28-9), and that all that wire which they were using at that time was wire that was brought down on the dredge from San Francisco (id. p. 53). He admits that after November 10th, 1905, perhaps a month later, they used right lay wire for swinging wires, saying that they used 'Lots of it' (id. p. 45).

"Captain Miller testified for the claimant that, being engaged in the wrecking business, he did work for the dredger company in removing obstacles and was on the dredge very often, almost every day during the whole of the time she was in Honolulu harbor (Tr. p. 148). He testifies that he noticed the wire which they were using because it was unusual, and that it attracted his attention and that it was right and left lay (id. p. 148); that it was open to everyone to see this because they kept their wire at a storehouse near the railroad wharf (id. p. 149). There are certain elements of weakness in Captain Miller's testimony. First, on the direct examination he was shown a piece of new right and left lay wire and asked to state the lay; he first said it was right hand lay wire. Upon being pressed by counsel he began again by the statement 'that is a right hand lay wire' (id. p. 149), and, as he went on with his answer, he changed his statement and called it a right and left lay wire. His description is incorrect in that he said 'the individual wires are twisted in a contrary way to which the strands are twisted, right hand, and the individual wires are twisted left

hand', which is a good description of right lay wire, and then he goes on to say 'that is what we call right and left hand lay wire', and a few lines further along (p. 150) he was shown Libellant's Exhibit 1 and asked what kind of lay it was and he answered 'That is a right hand lay wire; the individual wires is laid the same way as the strand', which is a wrong description as the court has stated above; that in a right hand lay wire the individual wires are laid in the opposite way from the strands. Another weakness in Captain Miller's testimony is that although he states he was familiar with the use of wires by the dredge all through her work and that she used the same kind of wires as mentioned, he qualifies this remark by saying he would not want to say that she didn't use others (id. p. 152). So that, if we accept Spencer's statement that after the accident, perhaps a month, they used right lay wires for swinging wires and 'lots of them', such use did not attract the attention of Captain Miller. Captain Miller admits his want of familiarity with right and left lay wires (id. p. 148) and his testimony must be taken as simply based on an impression which he received when his attention was directed first to right and left lay wire as being a form new to him and after that time, having no reason to notice them, he failed to give them any particular attention and did not know when the dredge began to use right lay wire, and so if such wires were used before the 10th it would not necessarily have attracted his attention.

"Matson, for the claimant, was asked on page 64 of his deposition, when the subject under consideration was the loop placed over buoy 2, 'Do you remember what kind of wire it was that was used on that pennant, whether right lay or right and left lay?' He answered 'I didn't notice it, I didn't look over the wire'. Then on being asked 'Do you know what kind of wire you were then using aboard the dredge?' he answered 'Yes, sir, we were using right and left.'

"Now in connection with the incident already referred to—the raising of buoy 1 by the pile driver and finding a wire cable attached to its chain, we find that the witnesses who were present and who have testified to other matters connected with such cable, with the exception of Keawe, did not notice the lay of the wire. Keawe testified that he was over forty years old, a carpenter, had worked for the government nearly twenty years around the wharves, carpentering, going on scows and out to buoys, repairing of wharves and has had some experience with wires on shore and on the pile driver (Tr. pp. 340, 355). He said the wire found on buoy 1 was like Libellant's Exhibit 9 (right lay), and not like Libellant's Exhibit 10 (right and left lay) (id. p. 345), and on cross-examination, upon being asked what a right lay wire is, said 'there is one kind of wire has one lay that is different from another kind of wire which you can plainly see has a double lay, one going one way and the other going the other way' (id. p. 354). Counsel for claimant has attempted to belittle this testimony of Keawe in regard to the lay of the wire found on buoy 1, speaking of Keawe as a 'common laborer' (Claimant's Brief, p. 16). The evidence shows that he is a mechanic of long experience in government work, in which he has had much to do relating to the use of wire cables and general repairing work. No reason exists for throwing aside his positive testimony, especially considering his satisfactory description of the difference between right lay and right and left lay wire cables."

(Decision III, 1011-1015.)

As regards the attempt of the claimant made in the lower court to discredit the evidence of both Keawe and Pololu by showing that they were not on the government pay roll for the day in question, we merely refer to the

lower court's reasoning demolishing this claim without quoting from it.

(Decision III, 1016, 1017.)

We therefore submit that here again, on this subject of the kind of wire used by the dredge, both Spencer and Matson are discredited by disinterested testimony, and for this reason another doubt is thrown on Spencer's statement that he removed the wire from buoy 2.

c. Date on Which Spencer Removed the Wire From Buoy 1.—While Spencer was, as already pointed out, very shaky in his evidence as to dates, he was sure that the pennant and loop from *buoy 1* was not taken up the next day after the accident (Spencer II, 506). And as the court well says, he is contradicted by a large number of witnesses on this point, whose testimony there is no reason to doubt (Decision III, 1009, 1010).

d. The Evidence As to the Course Taken by Spencer and Matson in Going to Buoy 2 and Their Going Through Shallow Water to Get There.—This subject is, we believe, the only material matter testified to by Spencer and Matson thus far left uncovered, and with their contradiction on this point by testimony, which is *not open to dispute,* it would seem that their entire evidence crumbles and becomes unworthy of any credence whatsoever.

Spencer testified in this case that they went out to lay the pennant to buoy 2 in a *boat,* that the depth of water in the place where they laid it was from one to five feet for about three or four hundred feet, that the water

was not always deep enough to float the boat and that they had to get out and walk and push the same along (Spencer II, 469). Matson, as usual, was not so positive, but he too testified that they went through shallow water (Matson II, 521, 522). To explain this testimony, palpably untrue on the face of it, some further reference to the circumstances attending the taking of the depositions should be alluded to.

Leading counsel for the claimant was at the time in question a stranger to the harbor of Honolulu, its depth and the location of its buoys. He had in his possession and introduced in the deposition what seemed to be a blue print from an official map of the harbor. It is also reasonable to suppose that he had some knowledge of the testimony later elicited from the witness, Easton, relative to the dangerous proximity to the buoy reached by the "Siberia" in backing out from the wharf. Examining the blue print in the light of Easton's expected evidence, and the location of the buoy as shown by Spencer and Matson, it is easy to see how counsel could have been misled with reference to the depth of the water in a course extending from the dredge, as she lay on the other side of the lighthouse, to buoy 2; for, with the buoy in the location testified to by Matson, the blue print clearly indicates shallow water for three or four hundred feet in such a course and, relying on the facts enumerated, counsel allowed Spencer to mislead him, not only into trying to prove the affirmative defense of the answer (that the "Siberia" negligently backed into shallow water), but also into crediting the truth of Spen-

cer's statement as to the water's depth on a line from the dredge to the buoy.

We shall say nothing in this brief as to the desperate attempt made in the lower court to keep out libelant's rebuttal evidence as to the depth of the water (II, 727-730, 748, 749), nor to the method employed by counsel in examining the small boys called by libelant on this subject (id., 749-751, 765-767). Suffice it to say that it was absolutely established by five boys and the witness, Monoghan, that a *gasoline launch* was used to tow one of the dredge's pontoons to buoy 2 at the time the wire was affixed and that its course was through *very deep water* (Schulte II, 754, 755; Thompson III, 770; Cassidy id., 773; Harrub id., 776; Monoghan id., 781). Each one of the witnesses also flatly contradicted Spencer's statement as to getting out of his boat and walking. In addition to calling these witnesses, libelant also proved by several harbor men that it was impossible that the conditions should have been as testified to by Spencer and Matson (Fuller III, 852, 853; Lorenzon id., 859, 860), and that the water between the dredge and the buoy was from twenty-eight to thirty feet deep (id.). The only comfort counsel could get out of any of libelant's witnesses on this point was in Captain Tripp's statement that the buoy was in a bight, a matter in which the witness was clearly mistaken. But even if this were true and Spencer and Matson *might,* by a roundabout course, have laid the pennants in shallow water, the fact remains that *they did not do so,* as shown by the clear evidence of the four boys and Monoghan.

It should also be pointed out that the course which Spencer and Matson took in going to buoy 2, as testified to by them, would be an inconvenient and indirect one (Decision, III, 1007, 1008).

Under the circumstances, is it any wonder that the lower court described claimant's evidence as "not worthy of credence", "wholly disproved by preponder-" ating and reliable evidence to the contrary" (Decision, III, 1030), and "preposterous on the face of it" (Id., 1011). The evidence on this point forms sufficient reason for *absolutely disregarding all the testimony of Spencer and Matson as to buoy No. 2,* for they either must have remembered some other buoy and some other occurrence or else they were deliberately falsifying.

We submit in concluding this phase of the case that Spencer's evidence is weak and indefinite, that it presents, taken by itself alone, no sufficient showing of the removal of the dredge's wire from buoy No. 2, that it is contradicted in *all* its essential features by reputable and disinterested witnesses, and that it presents, under the circumstances, no ground whatever for the conclusion that the kind of loops made and wire used by the dredge were inconsistent with the conditions found on the "Siberia's" shaft. The same remarks largely apply to Matson's evidence also. We are, therefore, able to proceed to the discussion of whether the wire which fouled the "Siberia" belonged to the dredge with the placing of the wire over buoy 2 clearly shown, its re-

moval not shown and with the fact that there is nothing in the evidence inconsistent with its being the dredge's wire.

ALL THE CIRCUMSTANCES OF THE CASE POINT TO THE CONCLUSION THAT THE WIRE CABLE WHICH FOULED THE "SIBERIA'S" PROPELLER BELONGED TO THE DREDGE.

No case could better illustrate the difficulty of presenting positive evidence of liability than does the case at bar for, as is said in 59 Fed. Rep. 367, "Here in the " nature of things the evidence is unsatisfactory. No " one knows the condition of affairs at the bottom of the " river on the morning in question". Yet, link by link and by process of exclusion, it seems to us that libelant has built up an impregnable case against the dredge on facts which are undisputed.

In the first place, we start with the fact that a wire was placed by the dredge round the anchor chain of buoy 2 on the evening of November 4th and that a shackle was used in the fastening. We next have the fact that this wire was used by the dredge on November 5th and the morning of November 6th, on which date it was disconnected and the section immediately adjoining the buoy was dropped to the bottom of the harbor. We then have the facts *that no one else besides the dredge was using wires in the harbor at the time, that no use of buoys by putting lines over their submerged mooring chains except by the dredge was known to men familiar with the harbor and, furthermore, that this particular buoy had a large ring in the top of it expressly*

for mooring purposes and no one had ever seen it used in any other way (Morse, II, 653, 663; Fuller, II, 645; Tripp, III, 811).

It is true that Captain Miller, testifying for the claimant, made some dark hints as to the use of the buoy, but his testimony in its final analysis referred rather uncertainly to the vessel "Mokolii" alone and, as to this, he was flatly contradicted both by Captain Fuller and by the witness, Young (Fuller, II, 648; Young, III, 939, 940). Even Captain Miller testified that the fastening of a wire round the mooring chain would be a fool thing to do (Miller, II, 712). All of this evidence, coupled with the actual placing of a wire round the mooring chain and the failure to show its removal, would seem to point conclusively to the dredge as the responsible agent.

Nor is this all. Claimant contended in the lower court that its *custom* was to take up the dredge's wires as soon as the swinging wires for the next position were made fast. But the evidence in the case is all against claimant on this point, except so far as Spencer's bare word goes. Morse's evidence is clear to the effect that after the dredge completed her work several of her wires were found in the harbor (Morse, II, 657). Lorenzon testified that the dredge had quite a number of her floats lying round the harbor (Lorenzon, II, 563). Most important of all, however, is the fact that at buoy 1 the loop was left attached for at least a week, according to Spencer's own evidence, and probably the only reason for its removal was an awakening consciousness on the

part of the claimant that it was not wise to leave its wires where they might foul large steamers. And finally, as to buoy 2 itself, the loop (again according to Spencer's own evidence) was left there for two or three days and hence for some time *after* the swinging wires for the next position were made fast. Considering all these circumstances, as well as the fact that the dredge only began work on *November 3rd,* the contention as to a "custom" prevailing on November 10th assumes a somewhat humorous aspect.

It was also claimed in the lower court that it was the custom of the dredge to buoy the end of its sunken wires and there was no float found on the "Siberia's" shaft. This is a small circumstance. In the first place it is pretty clear what would have happened to a small wooden float if it had been brought in contact with the steamer's propeller, and the mere fact that Lorenzon and Tripp did not see one by no means establishes that it was not there. Nelson, who testifies to the custom, does not know whether the wire in question was buoyed or not and says that he did not see any float (Nelson, II, 379). It is quite conceivable that in unshackling the outer pennants the inside wire might have been carelessly let go, *and that may have been one of the reasons why it was not subsequently removed.* The lack of a float is rather further evidence of claimant's negligence than anything else. If the evidence had disclosed one counsel would doubtless have contended that we were guilty of negligence for running on it. However this incident is viewed, its importance is very slight, and the lower court so held, saying in part:

"Such floats from the nature of the case would be inconspicuous at a distance and there is no evidence that they were placed there for the sake of a warning to ships."

(Decision, III, 1031.)

And in the case of "The Commodore", 40 Fed. Rep. 258, the court said:

"It is quite immaterial whether the anchor was marked by a buoy. It ought not to have been there at all."

Claimant also showed in the trial court the picking up of other wires and materials by the dredge in its work, but this does not appeal to us as being helpful to a solution of the question as to who placed the wire in such an *unusual* position round buoy No. 2, a method which, so far as the evidence shows, was *only* employed by the dredge. And it is in evidence that *none* of the wires so picked up were attached to buoys.

Finally, we have the further fact that both the *shackle* and *clamps* found in the wire on the steamer's shaft were similar to those used by the dredge (Morse, II, 656, 657; Matson, II, 527; Lyle, III, 944, 960). And, referring specifically to the dredge's wire, shackle and clamps found on buoy 1, Lyle, the diver, testified as follows:

"Q. Did you make any examination of the shackle and clamps?

A. Yes, I looked at them pretty closely because after looking at those that night on the 'Siberia' I wanted to see if they were the same.

Q. What was the result of your examination?

A. They were exactly similar to what I found on the 'Siberia' inside there."

(Lyle, III, 944.)

"A. *Yes, sir, I know exactly what I seen there and what I seen at the lighthouse; they were exactly the same size of wire, the size of the shackle, the size of the clamps.*"

(Id., 960.)

In addition to this, the wire fouled by the "Siberia" was a *new one* and had evidently not been in the water more than two weeks at the outside (Lyle, II, 616), a fact which also makes strongly against the dredge.

It is difficult to find cases squarely in point but the cases to be cited under our next heading show how the courts reason on strong probabilities and we refer to the following additional authorities.

In the case of *The Alabama,* 18 Fed. Rep. 831, a tug ran on an anchor lying 100 feet from the scow Alabama. The question as to whether it was the Alabama's anchor was raised and the court said:

> "I cannot doubt, upon the evidence, that the anchor belonged to the Alabama. The place of collision corresponded with the place at which the claimants stated that their anchor was dropped; no other vessel was shown at anchor there at the time. When the contact with the propeller took place the scow's chain at her bows was tautened. It was proved that schooners and other vessels occasionally dropped anchor for a short time, while waiting for orders in this broad slip or basin, but none extending such a distance from the vessel."

And in *The Joseph B. Thomas,* 81 Fed. Rep. 578, 585, it is said:

> "While there is no direct testimony that the keg was placed on the hatch covers at such close and dangerous proximity to the hatchway by some one connected with the vessel, still the strong probabilities of the situation, and the natural and reasonable inference to be drawn therefrom convince me that it was placed there by some person connected with the vessel. It is difficult to imagine how else it could have got there; for, although every one of the stevedore's gang was called as a witness, not one of them deposed that he had placed it there."

In *Atlanta Cotton Seed Oil Mills v. Coffey,* 4 S. E. 759, 760, it appeared that plaintiff's horse, while going past defendant's mill, stepped into a mudhole and at once showed signs of pain. Its feet were found to be scalded and it died. It was proved that the defendant used caustic soda in its mill to refine its oil and that, when dissolved in water, it would burn animal flesh. There was no evidence as to how any caustic soda got into the mudhole, but it was held that there was sufficient evidence to hold defendant, the court saying:

> "We think that there was sufficient evidence to authorize the finding of the jury, taking into consideration the fact that the horse was injured within a few feet of the mill, that caustic soda was used in the mill, and would burn animal flesh, and the further fact that the defendant did not account or attempt to account, for its presence in the water or the mud near its mill. The jury were authorized to infer negligence on the part of the defendant in allowing the dangerous substance to get from the mill to where it was."

We call attention also to the inferences drawn in the cases of obstruction to navigation soon to be referred to. We do not deem it necessary to cite further cases on this point, since every case depends upon its own peculiar facts as does the case at bar itself. We would merely point out that any evidence in negligence cases is sufficient which satisfies an unprejudiced mind.

We submit that, by applying a common sense view to the evidence in the case at bar, the only reasonable conclusion which can be arrived at is that the wire which fouled the "Siberia's" propeller belonged to the dredge, and that the finding of the lower court on this point was free from error.

III.

THE COURT RIGHTLY FOUND THAT IT WAS NEGLIGENT TO LEAVE THE WIRE AS IT WAS LEFT BY THE DREDGE IN THE HARBOR OF HONOLULU.

As the lower court well says in its decision,

> "The authorities on this question of negligence are harmonious on the rule that where an anchor, a telegraph line or a mooring cable is left on the bottom of navigable waters used by ships in such a way that a ship moving in such waters, with a draft which is not too great for its movement, without touching bottom, is fouled by such a cable, telegraph line or anchor, it is negligence on the part of those placing it in such a position."
>
> (Decision, III, 1027.)

See:

21 Encyc. Law, 443;

Spencer on Marine Collisions, Note 2 on pp. 314-315, and cases there cited;

Phila. etc. R. R. Co. v. Phila. etc. Towboat Co., 23 How. 209 (16 L. Ed. 433), (sunken piles);

Pajewski v. Carondelet Canal etc. Co., 11 Fed. Rep. 313 (sunken piles);

The Alabama, 18 Fed. Rep. 831 (anchor);

Omslaer v. Phila. Co., 31 Fed. Rep. 354 (gas pipe);

The Commodore, 40 Fed. Rep. 258 (anchor);

The Addie B., 43 Fed. Rep. 163 (anchor).

The above cases deal with *sunken* obstructions and are all interesting, but the main citations on which we rely are found in three cases against the Western Union Telegraph Co., two of which are cited in the lower court's opinion.

Blanchard v. Western Union Tel. Co., 60 N. Y. 610;

Stephens Transp. Co. v. Western Union Tel. Co., 22 Fed. Cases 1301;

Western Union Tel. Co. v. Inman S. S. Co., 43 Fed. 85; affirmed in 59 Fed. 365.

All of these cases are directly in point, but we deem it only necessary, however, to quote from the *Blanchard* case at page 515. The court there says:

> "Navigation is injuriously interrupted when the channel of the river is made less safe, and ships and vessels are hindered, delayed or injured. Telegraph cables so laid or suspended in the water as to

> catch upon the keels or come in contact with vessels navigating the stream, with such draught as the depth of water will permit, and which, but for such cables, would pass without difficulty or interruption, are improperly placed, and do injuriously interrupt navigation. * * * A prima facie case was made against the defendant when the plaintiffs proved that the steamer, adapted in all respects to the navigation of the river, and which had for years, and in safety, passed over this part of the stream almost daily, and requiring less depth of water than other vessels passing over at the same point without grounding, had come in contact with the defendant's cable and received injury. The very fact of a collision and consequent injury unexplained, authorized the finding that the defendant has, by its cables, unlawfully obstructed the navigation of the river, and caused the damage."

In the case at bar there can be no question but that the wire, placed where it was, was *in fact* an obstruction to navigation, and that the party who placed it there was guilty of negligence. Nor does it make any difference whether it was buoyed or not, as before shown, though the evidence of Lorenzon and Tripp would seem to show that it was not buoyed. Neither was it established that the "Siberia" negligently backed into shallow water, as also previously shown, or that she did not have a stern watchman at the time (Decision, III, 1030). No excuse whatever is offered for leaving the wire where it was and hence the burden of proof which the accident itself cast on the party who placed the wire there has not been met (see 59 Fed. Rep. at p. 367).

The present seems as good a place as any to meet the contention made by claimant here and in the lower

court that negligence could not be inferred but must be proved, and that libelant's case was made up of inferences based on inferences and presumptions based on presumptions. Such a contention entirely misconceives the purpose of libelant's argument. The point is that *whoever left the wire attached to buoy 2* was guilty of negligence and, *if* the wire belonged to the dredge, *it* was guilty of negligence. "Negligence", therefore, *was fully proved.* No assumptions, inferences or presumptions are needed on this point. The facts and the cases just cited show a negligent act and all that remains is to connect *the dredge* with that act. There is no need to "infer" negligence for it is absolutely established. The only "inference" which we ask the court to draw is that that negligence, clearly proved, was the negligence of *the dredge.* It is not a case of an inference based upon an inference or a presumption based upon a presumption. There is but one question for solution and that is,—Did the wire which fouled the "Siberia" belong to the dredge? And we think that we have shown that it did by irrefutable testimony,—the highest which the nature of the case permitted.

It having, therefore, been established that the dredge caused the original accident, the only questions left to be discussed are what damages libelant suffered and whether those damages or only a portion thereof (and, if so, what portion) were the proximate result of fouling the wire cable.

IV.

LIBELANT'S DAMAGES.

Although the amount of damage suffered by libelant is not disputed, we feel that we should here briefly refer to the various items which go to make up the claim, and should also very briefly refer to the principles of law justifying the allowance of such items.

Libelant is not suing in this case for unliquidated damages, except so far as demurrage is claimed, for every other item represents actual expenditures, the recovery of which brings to libelant no bounty or profit, but is solely a reimbursement for the outlay made necessary by fouling the dredge's wire. Nothing is asked for the grooving of the "Siberia's" brass shaft liner, because no repairs were made to it; nothing is asked for the damage to the propeller blades except the cost of dressing down the indentations; yet the brass liner is unquestionably of less value than it was, as are also the propeller blades. We have preferred to present (save as to demurrage) a clean-cut case of *liquidated* damages which cannot be shaded or diminished in any degree.

The actual cost of repairs on the "Siberia" was $3,442.09 (Exhibit 6, III, 1081) and this was the reasonable value (Gardner, II, 421); the necessary docking at the regular rates amounted to $15,932.60 (Beaton, II, 412; Railton, I, 336; Wallach, I, 333); the three surveyors were each paid the regular tariff charge of $100.00 (Wallach, I, 333; Schwerin, II, 406); the Japanese diver was paid $125, though he testified that his work

was worth considerably more (Domei, I, 118); the Honolulu diver was paid $1,000 because of the unusual and extra hazardous character of his work and testified, without contradiction, that the charge was a reasonable one (Lyle, II, 618; III, 941), though he had to bring suit to recover it (Klebahn, II, 603); the painting of the "Siberia" cost and was reasonably worth approximately $1,350 (Wainwright, II, 425, 426; Graff, II, 427); and the demurrage, which included a delay of 7 hours in Honolulu and 4 days in San Francisco, was computed on the average daily net earnings of the "Siberia" for the twelve succeeding voyages, which were $858.68 per day, and thus amounted in all to $3,685.20 (Railton, I, 338). The total damages, therefore, actually suffered and paid for in cash, save as to demurrage, were $25,834.89, and libelant should recover the whole of it unless its conduct contributed to swell the amount, which point we are soon coming to.

Although the character of the items which go to make up libelant's claim was neither contested by claimant nor found unreasonable by the lower court, we think it appropriate to cite a few authorities showing, in a general way, the propriety of their allowance:

In *25 Encyc. Law,* 1032, it is said:

> "Subject to the limitation hereinbefore noticed, where a vessel is injured through the fault of another, her owner is entitled to recover what it would cost to restore her to as good a condition as she was in before the collision. In addition to the expense of restoring the vessel to its former condition, he is, broadly speaking, entitled to such remuneration as will place him in the situation he would have been in but for the injury."

This affords a true criterion of the proper reimbursement to be allowed and, if followed in this case, clearly establishes the propriety of all the items claimed. Concerning the repairs nothing more need be said at present, since the expenditures in this respect were undoubtedly necessary and proper. The same is true of the payments for divers, but we shall discuss under the next heading the question whether claimant is liable for the full charge made by the diver in Honolulu. As to the surveys, these were necessary for several reasons: first, to determine the necessity for dry docking; second, to determine on the repairs necessary; third, to satisfy the underwriters, who had to make the damages good; and fourth, to preserve the rating of the vessel, a matter of obvious necessity to the owners.

See

Spencer on Marine Collisions, Sec. 205, and cases cited.

As the item for painting was disallowed by the court, we shall discuss the subject later under a separate heading.

Demurrage should also be allowed as the lower court recognized. The detention in Honolulu for seven hours was absolutely necessary, and if the "Siberia" arrived at Yokohama on time it could only have been at an increased expense. The delay in fact took place and should be paid for. The claim for delay in San Francisco is certainly just. Although in the dry dock for a week, only four days delay is claimed because the vessel sailed only four days behind its scheduled time (Hamil-

ton, I, 226). Those four days at least are gone forever and here again fair compensation is necessary. Demurrage is always allowed under circumstances such as the present and the probable net earnings of a vessel form the acknowledged basis on which to compute the amount due.

See:

Spencer on Marine Collisions, Sec. 204;
9 Encyc. Law, 263;
H. M. S. Inflexible, Swabey, 200; 204-5;
The Fannie Tuthill, 17 Fed. Rep. 87, 89, 90;
The Bulgaria, 83 Fed. Rep. 312, 314.

So liberal are the courts in regard to demurrage that even where the injured vessel is replaced by a spare boat, at practically no additional expense, so that the owner actually loses nothing, full demurrage is still allowed.

The Favorita, 18 Wall. 598 (21 L. Ed. 856);
The Cayuga, Fed. Cas. 2537.

We shall discuss under the next heading whether the court rightly deducted 11 per cent of the San Francisco demurrage claim on the ground of libelant's contributory negligence.

The most important item, of course, is that for dry docking, and here again there seems to be no attack on either the necessity for docking or the bill charged for it, so we shall not give this subject any extended discussion. That the docking was necessary is clearly established by the testimony of the three surveyors

and Hamilton. That the charges were the usual charges and were reasonable also clearly appears from the uncontradicted evidence of Beaton. We shall later take up the question whether what happened *in Honolulu* made the docking necessary, but, assuming for the present that it did, it is obvious that the fouling of the wire was the proximate cause of the dry docking and rendered it necessary. Charges for dockage or wharfage made necessary by a collision have always been recognized as an element of the damages.

25 Encyc. Law, 1037;
The Empress Eugenie, Lush., 138, 140;
The Switzerland, 67 Fed. Rep. 617, 618;
The Fannie Tuthill, 17 Fed. Rep. 87, 89;
Vantine v. The Lake, Fed. Cas. 16,878;
The Jas. A. Dumont, 34 Fed. Rep. 428.

Such charges are allowed even where it later turns out that no repairs are necessary, or that they are not worth while making.

Spencer, p. 357;
The Empress Eugenie, supra.

While the evidence was being taken, an unsuccessful attempt was made to show that the "Siberia" would have docked at the time for painting irrespective of the accident. The uncontradicted evidence, however, on this point was that there was no rule as to time for docking (Schwerin, II, 405, 406), and the vessel's condition would not have warranted docking at that time (Watson, I, 296; Evers, I, 322; Stewart, II, 392). The most that can be said is that the record shows that she *might* have been

docked for painting, and it is clear that this possibility does not relieve the dredge, for it is well settled that when an outlay which was but *discretionary* is made a *necessity* through the wrong of another, it may be recovered. The claim for dry-docking should be allowed in full.

We, therefore, submit that, on the evidence, the libelant should be reimbursed as to all the items claimed (unless it was guilty of contributory negligence), and that it should be placed as far as possible in the situation that it would have been in but for the dredge's negligence,—it asks no more, and we submit that it should be awarded no less.

V.

THE COURT ERRED IN CHARGING THE LIBELANT WITH CONTRIBUTORY NEGLIGENCE IN TAKING THE "SIBERIA" OUTSIDE THE HARBOR INSTEAD OF BACK TO THE WHARF, AND IN PROCEEDING TO YOKOHAMA WITHOUT REMOVING THE WIRE CABLE FROM THE SHAFT, AND HENCE ITS DEDUCTIONS FROM ITS AWARD BASED UPON SUCH CONTRIBUTORY NEGLIGENCE ARE ERRONEOUS AND THE AWARD SHOULD BE INCREASED.

On the trial the claimant produced no evidence in support of the theory upon which libelant's damages were cut down. Hence, we are not asking for the review of findings based on conflicting testimony.

Unfortunately, the master of the "Siberia", who ordered the maneuver in question, died within a month of the accident (Hamilton I, 227). Lacking his evidence, the only witnesses who testified in the case on the propriety of the course pursued were Captain Lorenzen, the pilot; Hamilton, the chief engineer; and Lyle, the diver. It will be advisable, therefore, to examine parts of their evidence.

Lorenzen's testimony as to the complicated maneuver which the "Siberia" is compelled to make when she first proceeds from her berth (Lorenzen II, 551-553), examined with the assistance of the map (Ex. 5, III, 1080), shows the difficulties of navigating a ship of the "Siberia's" size in the narrow channel of the harbor of Honolulu, with its buoys, piles and dolphins. At the time of the accident the "Siberia" had backed out from the wharf, swung around towards the sea and begun her forward movement, although her starboard propeller was still moving astern (Lorenzen II, 572). The tug which was on her starboard bow had cleared the dolphins and was going straight out through the channel (id., 553). At this point the contact with the wire cable took place. The buoy, according to the witness, Legros, "*raced*" over to the stern of the ship (II, 693) taking "less than a minute" to reach it (id., 687). The starboard engine suddenly slowed down and did not turn strongly enough (Hamilton I, 208, 209). The "Siberia" could not have anchored inside the harbor because there was not room enough and it would

have been unsafe (Lorenzen II, 556, 557); she could not stay where she was; she and her tug were pointed for the outer channel, and it was considered best under all the circumstances to proceed outside the harbor (Id., 557, 567-569). We quote the following extracts from Lorenzen's evidence:

"Q. Captain, after you received notice that the starboard propeller had fouled the buoy, what did you do, what did the 'Siberia' do?

A. We stopped both engines after we knew that we was afoul of the buoy, and I asked the captain what we had better do. The captain said go outside and anchor.

Q. Did you go outside and anchor?

A. We did go outside and anchor, using the tugboat ahead and the port propeller.

Q. What was the matter with the starboard propeller?

A. It was foul of the buoy.

Q. Did you use it on the way out?

A. No.

Q. What, captain, is your judgment with reference to the propriety of proceeding to the mouth of the harbor with the buoy rather than anchoring there in the channel?

A. We could not anchor where we was at the time.

Q. You could not?

A. No.

Q. What is your judgment then with reference to the propriety of proceeding outside? Was it the right or the wrong thing to do.

Mr. Frank. I think the court will determine whether it was the right or the wrong thing to do. We make the objection that it is incompetent and immaterial calling for the expression of the witness on a matter that is on trial before the court itself.

The COURT. I think that he is an expert and can testify as to whether it was *necessary* or not. The use of the word 'right' was rather a general word, the real question is whether it was *necessary* or not. I will allow him to answer the question as to its necessity.

Mr. FRANK. Exception.

Mr. MCCLANAHAN. Q. Was it necessary or unnecessary for you to have proceeded to the channel mouth at that time as against anchoring where you were?

A. It wasn't safe to anchor the ship where it was at that time.

Q. Was it the seamanlike or the unseamanlike thing to take the ship out to the anchorage to which she was taken?

A. I think it was the proper thing to do."

(II, 556-557.)

And on cross-examination:

"Q. You thought that was a good thing to do because there was not a good place to anchor where you were at that time?

A. Yes.

Q. Is there any place in the harbor where a steamer might anchor?

A. Not a steamer of that size.

Q. Why not?

A. There is not room.

Q. What do you mean there is not room?

A. There is sufficient length of the vessel—to give sufficient chain to hold the vessel they either have to anchor outside or go alongside the wharf.

Q. Then why didn't you go alongside the wharf?

A. Well, that was one of two things to do,—to go outside or go alongside the wharf.

Q. It would have been possible to go alongside the wharf again after you found something the matter with the vessel?

A. I think it was possible.

Q. Now don't you think that when a big ship like that is going to sea and finds she has an accident by something under her propeller, it would have been better and more prudent seamanship to go alongside the wharf to find out what the matter was than to go out to sea?

A. I don't think so.

Q. Don't think it would have been more prudent and safer to remain in the harbor?

A. I do not.

Q. Quite as safe out in the ocean as alongside the wharf?

A. It was better outside for one reason, for my recollection was that on former occasions where a vessel has gone ashore the diver prefers to examine the vessel outside in clear water rather than alongside the dock in muddy water.

Q. The only reason you have for that suggestion is that you think the diver would prefer to examine the vessel outside in clear water rather than alongside the dock in muddy water. Is that the only one?

A. Well, as a matter of fact I wasn't consulted at all.

Q. Will you kindly answer my question.

A. No, that is not the only reason.

Q. What other reason have you?

A. I thought it would be safer to proceed out to sea as we had a tug boat here and were pointed out, than to try to go back to the wharf where we had to shift the tug boat and her propeller about to use only one of her propellers with that buoy under the stern.

Q. Did you not use the port propeller all the time?

A. Going out, yes.

Q. Why then would you probably not be able to use the port propeller going alongside of the wharf?

A. Because going ahead with the buoy fouled under the starboard propeller, we would be going ahead and the buoy would be trailing astern. If

we had to go astern at all we would have to go over the buoy and the buoy would have a tendency to come under the ship and it is dangerous.

Q. Isn't there such a thing as passing lines ashore and warping your vessel in?

A. It is possible.

Q. And is not that an ordinary and usual means of bringing a vessel alongside of the dock?

A. We do that sometimes.

Q. Very frequently, don't you?

A. Yes.

Q. And that avoids the necessity of using your propellers or a tug boat?

A. Yes."

(Id., 567-569.)

On the same subject Hamilton, the engineer, testified as follows (without any cross-examination on the point):

"Q. In your judgment as a marine engineer, as the chief engineer of the 'Siberia', was it proper for you to proceed, under the circumstances, from this port to the port of Yokohama on the morning of November 11th, 1905?

A. Yes, sir.

Q. From your judgment was it proper for the vessel to proceed from the point where she came in contact with the wire to outside the channel entrance, before anchoring?

* * * * * *

A. *Yes, sir; I believe it was very good judgment.*"

(I, 226.)

We shall leave out of consideration what Lyle said generally as to the relative advantages and disadvantages to a diver in working inside the harbor as against working outside and, apart from this, the evidence of Lorenzen and Hamilton above quoted *is the only evi-*

dence in the case on this question. Yet the lower court entirely disregarded this testimony and said:

> "The question arises whether it was *necessary* for the 'Siberia' to proceed outside of the harbor and anchor in a seaway at the time of the accident. * * * No *necessity* appears in the testimony for the movement which took place to the outside of the harbor. It was not an emergency under difficult and dangerous circumstances which would excuse a master or a pilot from ordinary cool judgment. The ship was within a few hundred feet from the city wharves and might have been taken there either by warping or the assistance of the tug, or both * * *."
>
> (Decision III, 1033.)

Lorenzen's testimony, above quoted, shows clearly why the *tug* could not have been used and his meagre evidence on the subject of warping the vessel (not followed up in any way by the claimant) in no way justifies the court's conclusion. Moreover, despite this latter testimony, he still thought it the better and more seamanlike course to proceed outside, as did also Mr. Hamilton. Not only does the lower court, therefore, squarely differ from the uncontradicted evidence, but it fails to take cognizance of the obvious principle of law that the question was one *resting solely in the discretion of the master of the ship,* and we submit his judgment should not be impugned unless it appears to have been palpably wrong. It was perfectly obvious that the vessel could proceed in safety to an anchorage at the mouth of the harbor without using her starboard propeller, which was the one known to be in contact with the obstruction. A movement in any other direction than forward would

have incurred further danger, and as far as the suggestion of warping is concerned, we submit that warping a vessel of the "Siberia's" size to the dock in *broad daylight* would have been no easy undertaking,—how much greater the difficulty and danger of doing so with the vessel in a crippled condition and darkness approaching. (It will be remembered that the wire was picked up about 5:30 P. M. and that it was near the end of the year.)

This is not a question of whether anything was done or omitted by the libelant contributing to the primary injury (fouling the wire) as a proximate cause, but whether libelant, being free of contributory negligence, is to be charged with the result of adopting a perilous alternative, the necessity for which arose from the situation imposed by the primary wrong.

It must be conceded that what was subsequently done by the master of the "Siberia" was intended solely to bring about the relief of his vessel. He could not anchor her where she then was, so the alternatives were presented of taking her to the channel entrance or else back to the wharf. As has been pointed out, the court says of the situation:

> "It was not an emergency under difficult and dangerous circumstances which would excuse the master or pilot from ordinary cool judgment."

This statement, in our opinion, reveals a misconception, for it must be apparent that there was an emergency and that, through it, there was created the necessity of adopting one of two alternatives, both of them attended with difficult and dangerous circumstances.

The court holds that there was no *necessity* for taking the "Siberia" out to the channel entrance, and on this ground alone rests its finding of what it calls contributory negligence. We submit that it is perfectly clear that there was a necessity to either take her there or back to her dock, and that the fault of the master is not to be found in the non-existence of a necessity but in the adoption by him, of necessity, of one of two perilous courses. If, therefore, there was an emergency necessitating the adoption under difficult and dangerous circumstances of a perilous alternative, the test applied by the court of "ordinary cool judgment" is, we submit, inappropriate. Is it not rather: Did the master in bad faith adopt a palpably wrong course? Or, on the other hand, did he choose in good faith a course which was not palpably wrong?

Even though the master should be held to the exercise of "ordinary cool judgment", we submit that there is nothing in the record to show that he fell short of this test. Of course, if it be conceded or contended that libelant's liability is created through the lack of *necessity* for taking the "Siberia" outside, then, we have nothing to say further than to comment upon the novelty of such a doctrine when applied to an act admittedly done in good faith to relieve the vessel.

The court's reasoning seems to us to be affected by a negative pregnant, if we may use the term, for truly it was not necessary to take the vessel outside, but it was necessary to take her either outside or back to the wharf. In the solution of such a situation we submit that the

master's judgment, if exercised in good faith, even though in the light of subsequent events it proves to have been erroneous, should not be set aside for the judgment of the court, especially where all the evidence of the case shows that, viewed in the light of subsequent events, the master's course was a proper one. The only ground for complaint as to the course pursued by the master is suggested by the wrongdoer who says that the diver charged $1,000 for doing work which he would have charged much less for if the master had taken the vessel to the dock.

We submit that it does not lie with the wrongdoer to complain at all but, conceding to it this right, the answer is obviously conclusive: How was the "Siberia's" master to be charged with knowledge of the underwater situation surrounding his steamer's crippled propeller which would call for a charge of $1,000 for the diver's services outside, and a much reduced charge for his services at the dock? He certainly is not to be held derelict in duty for failure to make calculations tended to lessen the wrongdoer's burden, when he is not in possession of any data on which the calculations might be based. With night approaching his decision had to be made at once and, even though the question of relative costs had come to his mind, he would have been in no position to pass upon it, and we doubt whether the diver himself would have been any better able to do so. Captain Smith's sole concern was for the safety of the valuable ship entrusted to his care, and it would have been unusual, under the circumstances, to hold him to account for not

injecting into the consideration of his primary duty a monetary calculation to establish the possible difference between ascertaining the nature of his vessel's injury, viewed from perilous alternatives. And even had he done so, we submit that the controlling question must have still remained the safety of the ship rather than the necessarily problematic difference in the diver's charge.

CONTINUING THE VOYAGE TO YOKOHAMA.

On this subject the court says:

> "This ruling as to the unnecessary action of the 'Siberia' in leaving the harbor affects also its responsibility for such injuries as may have resulted by its continuance of the voyage without removing the wire coil from the propeller shaft. It is clear that this might have been done without delaying the ship more than two or three days, if she had remained in the harbor. She took the responsibility of going on without this, and with a protruding end of the coil of wire interfering with the revolutions of the propeller, which, the evidence shows, caused some injury. She is therefore liable for such injury."
>
> (Decision III, 1034.)

It will be seen from the above quotation that the court's finding as to the propriety of proceeding to Yokohama rests mainly, if not entirely, on the unnecessary action in taking the "Siberia" outside the harbor. If, therefore, the first action was not of such a nature as to charge libelant with contributory negligence, as we think we have clearly shown, the basis of the second finding goes by the board. Nevertheless, some brief comment on this subsequent action may be appropriate.

With the "Siberia" safely at anchor outside the harbor, Mr. Lyle, the diver, was at once sent for. It is to be noted in this connection that there were no other divers in Honolulu at the time; Lyle's brother (the only other diver) having left for Kahului that evening on an inter-island steamer (Lyle II, 617). Mr. Lyle was at work for practically seven hours and, without quoting from it, we refer to his evidence to show in detail what he did and the difficulties he encountered (Lyle II, 607-617). By sawing the wire cable he released the chain, but found the *wire* itself so tightly wound round the shaft that he could neither cut nor move it. Being pretty well played out, he could do no more that night, and the following is his testimony as to what then took place:

"Q. What did you next do?

A. Next they wanted me to go down to make an examination whether the ship in my judgment or not could proceed on her voyage.

Q. Did you make that examination?

A. I did, and reported *that the vessel could proceed on her voyage.*"

(II, 614.)

* * * * * *

"Q. What were the facts as to the condition of this wire that led to your opinion that it would be safe to proceed with it around the shaft to Yokohama?

A. It was wrapped so tight around, and the only ends protruding was the ends I had made myself which would touch the propeller but *in my opinion would not hurt the propeller.*"

(Id., 617.)

* * * * * *

"Q. These two parts when you told them to go ahead you thought they would not interfere with the propeller?

A. Well I knew they would touch the propeller when the ship went ahead, but these two ends would come aft, and as it revolved would strike it, *but wouldn't hurt the propeller.*

Q. You didn't think it would hurt the propeller?

A. No, I didn't think so."

(Id., 622.)

In addition to this evidence we refer to that of Hamilton, the chief engineer:

"Q. What happened after that?

A. The diver went down again and was working quite a while, made several dives, six or eight dives; he was working with a hack saw down there and the last time when he came up he said he would have to give it up, one man couldn't clear it, he said, as it was a big job. We asked him how long it would take, he said he had no idea, he would have to get assistants. I asked him if the chain was all off and he said yes. I asked him where this wire was, and he told me on the end of the sleeve. I asked him about how much, well, he said he should judge twelve or fifteen turns, so I talked with the captain a while. Then I went into the ship, after everything was clear of the propeller, everything clear on the surface, the gear was all worn (gone), went into the ship and I moved her, backing, just by swinging the link. I then had the first assistant engineer do it, and I went back and listened at the stern, to see if I could hear any unnatural noise; there was nothing and I suggested that we proceed to Yokohama.

Q. That is you heard no noise from the turning of the shaft?

A. No.

Q. And while you listened the shaft was turning?

A. It was.

Q. Well, you proceeded to Yokohama, did you?
A. Yes, sir."

(I, 213.)

* * * * * *

"Q. In your judgment as a marine engineer, as the chief engineer of the 'Siberia', was it proper for you to proceed, under the circumstances, from this port to the port of Yokohama, on the morning of November 11th, 1905?
A. Yes, sir."

(Id., 226.)

There is, therefore, direct testimony in the record given by two witnesses, who were the most competent to testify on the subject and whom there is no reason to disbelieve, that in exercising his discretion in proceeding to Yokohama, the master acted wisely. And here again *no evidence whatever* was offered by the claimant as to the *impropriety* of such procedure and the court's finding has, therefore, no basis on which to rest. Indeed, the propriety of proceeding to Yokohama finds strong attestation in Domei's evidence which shows that the wire remained stationary when the shaft was turned at Yokohama and that it must also have remained stationary during the entire voyage (Domei I, 114, 115).

Other facts should be noted as bearing on this question. The "Siberia" at the time was carrying United States mails, she had a cargo worth one million dollars on board and many passengers. Mr. Lyle was the only diver in Honolulu at the time and had no idea how many days and nights it would take him to remove the wire (Lyle II, 616, 625-626; Hamilton I, 213). If the vessel had stayed in Honolulu, there could be no certainty as

to when the wire could be taken off and demurrage at the rate of $858 per day would be piling up, which claimant later would have had to settle. It will be noted in this connection that no demurrage is claimed by libelant for delay in Yokohama for the reason that the ship was doing her regular work of unloading and loading while the work of the divers was going on. If, however, the work had been done in Honolulu, it would not only have resulted in additional demurrage, but would unquestionably have taken much longer to accomplish as there was only *one diver* to do the work there, which it took *three divers* three days to accomplish in Yokohama.

Here again the question is not whether it was *in fact* the wisest course to proceed to Yokohama, but whether so doing constituted *a reasonable and proper exercise of the master's discretion.* We submit that it clearly did. The diver who alone knew the under bottom condition advised that it was safe to proceed and it would seem that the master was entitled to rely on his advice. The chief engineer, after testing his engines and listening at the stern, gave the same advice, and there is no ground for saying that it was not honestly given. Under the circumstances, the only logical course was for the vessel to proceed on her voyage and fulfill her obligations to the United States government, her consignees and her passengers and prevent demurrage from piling up. We, therefore, contend that everything which followed the fouling of the wire in Honolulu harbor was the natural and probable consequence thereof and that, for those

consequences and all of them, the dredge is clearly responsible.

The law governing both situations is perfectly clear and shows the error of the court's findings.

In the case of *The City of Macon,* 121 Fed. Rep. at p. 689, the court says:

> "After the collision there was but a short time in which to act if the vessel was to be removed to a place where she could lie on an even keel, as only an hour elapsed before it was high water. A wound had been received the exact extent of which was unknown, the vessel was making water and as it was necessary to send to Savannah, seven miles distant, for competent machinists in order to make permanent repairs, only temporary repairs were possible during the period of high water. A serious question confronted the master of the Teviotdale; should he make the attempt to move his vessel where she would lie on a level bottom or leave her where she was? If he adopted the latter course there was danger that she might receive structural injury at low water and, on the other hand, she might fill and sink if she were moved into deeper water. We are inclined to think that he adopted the wiser course. Until the nature of the injury had been ascertained and the wound repaired prudence suggested that he should remain where he was. There can be no serious question as to the truth of this proposition. The next high tide was about half past seven on the morning of the 25th.
>
> "The mechanics arrived from Savannah about five hours after the accident and immediately began the work of repair. In order to reach that part of the wound which was under water it was necessary to take out a portion of the cargo. The repairs were not completed until after high water on the morning of the 25th and at 8:30 that evening the Teviotdale was moved. Whether it would have been wise to

have moved her on the morning tide presents the same problem which confronted the Teviotdale on the evening previous. In view of the serious strain received by her bottom on the 25th it is now probable that a large part of the damage might have been prevented had she been taken off on the morning tide. But this strain could not have been foreseen and if those in charge of the vessel exercised their best judgment in the emergency it is all the law required of them.

"As was said in the Magnolia, Fed. Cas. No. 8958, 3 Am. Reg. 465:

" 'The inquiry must be, whose fault was it that such condition existed? A party who has involved himself and others in a peril cannot be heard to complain of the want of the clearest judgment in the selection of the modes of extrication,'

"The local pilot and the tugmen seem to have concurred with the master in thinking that it would have been bad judgment to float the vessel after the collision. That this could have been done with an hour more of flood tide, we have no reason to doubt. That these men took what they thought to be the safest course, as each emergency arose, cannot be successfully disputed. They acted in good faith and we have looked in vain for proof of such palpable fault on their part as will release the Macon. The wound inflicted by the Macon was the proximate cause of all the damage received by the Teviotdale; but for that she would have proceeded on her journey to Hamburg.

"We have in the collision a natural and obvious cause for all the subsequent disasters which befell the Teviotdale. *The court is not justified in entering the realms of conjecture for the purpose of theorizing as to what might have been the result had the sequence of events been different after the blow was given. The collision is sufficient to account for it all.*"

In *Stephens etc. Transp. Co. v. Western Union Tel. Co.*, Fed. Cas. 13,371, at p. 1302, the court says:

> "It is certainly true that the result shows that the means resorted to for the purpose of freeing the propeller's screw from the cables were not well adapted to that purpose; for in the end the cables became so tightly wound around the screw that it was necessary to dock the vessel and cut the cables off. But what is clear in view of the result was not necessarily so clear without the light of experience. The incident was not of common occurrence. The persons in charge of the propeller were persons of skill and judgment, who had no other desire than to get the cable free from the screw with as little loss as possible. Unquestionably they acted according to the best judgment they were able to form, and there is no evidence which will justify the determination that the course pursued was so plainly wrong as to cast the liability upon the propeller. The language of Dr. Phillimore in the case of the Clara Killam, 3 Asp. 463, that 'it was the duty of the ship, if possible, to disentangle her anchor from the cable without injuring it; she was bound to apply ordinary skill, and to take the time necessary for this purpose, unless she thereby exposed herself to present imminent peril', I fully agree with. Here the vessel took the time and endeavored to free the cable without injuring it. It was in an endeavor to free the cable from the screw that it became hopelessly wound about the screw. The cable was broken only after the effort to unwind it had been made and failed, and then there was no other way than to break or cut it. The result of their effort was not foreseen when the effort was made to unwind the cable and in the face of action taken by intelligent men, who were upon the spot doing what seemed best, I am unable upon my own judgment, passed after the event, to say that the result was so clearly to be foreseen as to entail a liability upon the ground of negligence."

In two important collision cases language very applicable to the case at bar will be found. Thus in *The George L. Garlick,* 91 Fed. Rep. at p. 928, it was held that:

> "When fault is traced clearly to a vessel, the innocent vessel will not be adjudged in fault for failure to avert the consequences of the fault of the first vessel, unless it be made *very plain* that departure from her first duty was demanded imperatively by new conditions and that a person of good judgment at the time and place would have made such departure."

And in *Alexandre v. Machan,* 147 U. S. 73 (37 L. Ed. 84), Judge Brown says:

> "Where fault on the part of one vessel is established by uncontradicted testimony, and such fault is of itself sufficient to account for the disaster, it is not enough for such vessel to raise *a doubt* with regard to the management of the other vessel. There is some presumption at least adverse to its claim, and *any reasonable doubt with regard to the propriety of the conduct of such other vessel should be resolved in its favor*" (p. 90 L. Ed.).

In *The Narragansett,* Fed. Cas. 10,019, vessel A negligently collided with vessel B. Thereafter vessel C went to the assistance of the latter and, through a misjudged but honest effort to save her, caused further damage. Vessel A was held for this, the court saying on page 1168:

> "A question is raised in respect to the liability of the steamer for part of the cargo on deck, which was deteriorated or lost, by the capsizing of the sloop in an endeavor made to tow her into port by the steamer Eureka. It is alleged that the unskill-

ful and improper manner of conducting the salvage caused the loss, and that accordingly it was only consequential to the collision; or if the deterioration or actual loss is chargeable against the steamer, she is not liable for the expenses incurred in recovering that part of the cargo lost overboard on such attempt to save the sloop. I perceive no reason for a distinction in this respect, in favor of the steamer. If the Eureka had committed an act of trespass, or wilful wrong, it might be different. But she found the vessel under water, apparently abandoned, and applied those measures in her aid which seemed best calculated to afford relief. A hawser was carried out to her from the steamer, and efforts were then made to tow her into a harbor. The cargo had so shifted, however, as to render the sloop innavigable; after moving her a short distance, and finding she was careening, the hawser was cut, and the sloop remained under water, most of her deck load having in the operation gone overboard. I do not think a fruitless effort to save the wreck, made in good faith, and so far as appears with good judgment, though leading, by its failure, perhaps to additional expense and loss to the wreck or cargo, can be regarded as wrongfully causing such damage, and thus exonerating the steamer from it. The mode of saving the vessel and cargo ultimately adopted was doubtless the most efficacious and judicious, but in the absence of the means afterwards obtained and applied, it could not be blameable to try any other at command which afforded a reasonable promise of success. In the then condition of vessel and cargo, those efforts were all apparently for the interests of the claimants. They being liable, in the first instance, for the entire value of both, their loss would be diminished in proportion to the amount of the property saved. Efforts directed alone to the saving of the wreck, although resulting disadvantageously and imposing enhanced expense in its final rescue, do not change the nature of the injury, and substitute a new cause and liability in place of the

colliding ship. I shall, accordingly, decree for the libellants, to the amount of the injury done the sloop, the value of the property lost, and the expenses and disbursements necessarily incurred in the salvage of that which was preserved."

Another very interesting case is that of *Amoskeag Mfg. Co. v. The John Adams,* Fed. Cas. 338. The case was one of collision with a vessel properly moored at a wharf. An examination was made and no injury below the water was discovered, though one would have been discovered if the pumps had been sounded and much damage might have been averted. The opinion is very instructive, but we merely cite the following brief portion of it:

"In the third place, it is insisted by the respondents that the master of the ship was guilty of gross negligence in not sounding her pumps immediately after the collision, and in not discovering the leak at an earlier moment. It is admitted by the libellants that the leak was not discovered until the next morning after the collision, and they do not controvert the fact that the vessel at that time had made ten feet of water, or that she was then drawing three feet more than she drew the day previous. But they deny that there was any negligence on the part of those in charge of the ship in not making the discovery earlier. * * * Examination of the vessel was made by the master immediately after his return, and before the steamer reached her slip. All the injuries that could be discovered indicated that the entire damage was above water. They were such as have already been described, but the pitch in her wood end seams above water was not cracked. In the course of the forenoon she was also examined by two experienced ship carpenters, who were sent by the respondents for the purpose of repairing the damage done by the collision. No directions

were given by them to have the pumps tried, and one of them assigns as the reason that he never thought of the thing, as he should not have supposed it possible that such a blow would have caused the vessel to leak. Witnesses called by the respondents express the opinion that the pumps should have been tried immediately, *but wisdom after the fact is entitled to much less respect than that which precedes the necessity for its exercise.* All can now see that it would have been wise to have tried the pumps but inasmuch as all the injuries were apparently above water, and the pumps had just been sounded, it is not probable that many, if any, ship masters would have thought of it at the time" (p. 796).

In some respects the above case is strikingly similar to the case at bar. From all indications *there* it was not necessary to sound the pumps, and "it is not probable " that many, if any, shipmasters would have thought " of it at the time", and *here* it was apparently unnecessary to remove the wire in Honolulu and the same quotation applies. The collision in each case accounted for the damage and in neither case can the respondent be excused because a different sequence of subsequent events might have lessened the damage, so long as the injured party acted according to his best judgment and in good faith.

In *The Oler,* Fed. Cas. 10,485, one vessel collided with and sank another. The latter was subsequently injured by other passing vessels, for which injuries the first vessel was held responsible.

In *The Albert H. Ellis,* 107 Fed. Rep. 303, the head note reads as follows:

"In an action for collision, it appeared that a ferryboat struck a scow in tow on the forward end,

which projected with an overhang. The collision was the fault of the ferryboat. The man on the tug examined her at the time with a lantern, it being after dark, and the scow being heavily laden and deep in the water. He discovered no apparent damage, and the tow proceeded. When some distance from the place of collision, the scow sank. An inspection after she was raised showed injury below the water line. *Held* insufficient to show negligence on the part of the tow in continuing on the voyage, so as to relieve the ferryboat from the consequences of the collision."

In the case of *The Benj. F. Hunt, Jr.,* 34 Fed. Rep. 816, it is said:

"* * * the master was uncertain as to the condition of the hull, and in good faith came to the conclusion that the prudent course for him to pursue was to take the tug. His decision ought not to be overruled except upon proof that he acted dishonestly or ignorantly."

In the case of *Greenwood v. Town of Westport,* 60 Fed. 560, 565, 566, it is said:

"It is well settled that if a plaintiff acts erroneously through excitement induced by defendant's negligence, or adopts a perilous alternative in the endeavor to avoid an injury threatened by such negligence, he is not guilty of contributory negligence, as a matter of law. 'And even though the injured person might have escaped the injury so brought upon him but for his hasty and mistaken conduct in the face of danger, yet defendant's negligence is the sole juridical cause of the injury, and plaintiff's error of judgment only its condition, when plaintiff was placed in the position of danger without previous negligence on his own part.' "

See, also:

The John Cooker, Fed. Cas. 7337;
Omslaer v. Philadelphia Co., 31 Fed. Rep. 354, 361;
The Magnolia, Fed. Case No. 8958, p. 482;
The North Star, 108 Fed. Rep. 436, 444;
The C. E. Paul, 175 Fed. Rep. 246, 250;
Spencer on Marine Collisions, Secs. 190, 196.

And with reference to the failure of the claimant to produce any evidence that the master of the "Siberia" acted improperly, we call attention to the language used by Judge De Haven in *The Czarina,* 112 Fed. 541, 545:

> "Upon the question whether a prudent master, surrounded by the same circumstances, would have pursued the same course, the evidence of experienced navigators would have been competent. The Frederick E. Ives (D. C.), 25 Fed. 447. *No witness of that character testified that the master of the Czarina, in leaving the raft, did what a prudent and careful navigator would not have done under like conditions.*"

Considering in this case the elementary rule that the burden of proving contributory negligence was on the claimant, which failed to offer any such proof, and considering also that libelant produced direct evidence of the propriety of both taking the vessel outside the harbor and subsequently proceeding to Yokohama, we think no other conclusion can follow but that in both cases the course pursued by the master was right. But, even if we concede in either course an error of judgment, neither was so clearly wrong as to relieve the dredge. One party cannot be allowed to get another into trouble

and then complain that in the emergency *caused by his fault* the best judgment was not used by the injured party.

Furthermore, as having some bearing on the subject last discussed, it is entirely conjectural as to what damages happened to the "Siberia" on the way to Yokohama, if any at all did, and can the claimant, which initiated all that followed, be heard to deal in conjectures? But for the claimant's negligent act *no* damage would have happened, and is it not rather for it to respond than to attempt to cast the burden on the libelant?

We must also consider the nature of the primary wrong and the contributory fault of the libelant, if fault there was. The claimant's fault was positive and distinct, while that of the libelant was, at most, a mere error of judgment. No one can question that libelant believed it safe to go on to Yokohama, and it was safe, as the events showed. No one believed that further damage would result because of the trip and no one would have believed it under all the circumstances. And if, by any fair construction of the evidence, it be found that damage actually did result (which subject we shall later take up), we think the loss should fall rather on the positive than the negative wrongdoer. As well said by a Federal judge:

> "* * * the nature of the primary wrong has much to do with the judgment, whether or not the alleged contributory fault was blameworthy. If it was of a negative character, such as lack of vigilance, and was itself caused by, or would not have existed, or no injury would have resulted from it,

> but for the primary wrong, it ought not, in reason, and I believe is not, in law, to be charged to the injured one, but rather to the original wrongdoer."
>
> (23 Fed. Rep. 741.)

We submit, therefore, that all injuries received, whether in Honolulu harbor or on the voyage to Yokohama, were the proximate results of the primary wrong of the dredge.

This brings us again to the items of damage which were reduced by the court because of its finding of contributory negligence. (We shall deal with the court's disallowance of the bill for repainting the "Siberia" under another head, as it involves a different principle of law.) These items were for repairs, docking and demurrage in San Francisco and the amount paid the Honolulu diver. If our view of the question of contributory negligence be adopted, there can be no question as to the first three of these items and the trial court's award, therefore, for repairs should be increased from $3,007.36 to $3,442.09; for the docking from $14,180.01 to $15,932.60; and for the San Francisco demurrage from $3,056.93 to $3,434.75. The services of the Honolulu diver really stand on the same footing, but a further word as to the charge for these services would seem appropriate because of the amount of the bill.

The lower court reduced the item for Lyle's services from $1,000 to $40 on the ground that, as the work was "unnecessarily" done outside, the latter was the diver's ordinary charge per day for work done inside the harbor in still water (Decision, III, 1033, 1034). In fixing the

award at the usual rate for ordinary work, the court manifestly overlooked the difficult nature of the service performed as shown by the fact that Lyle's hands were so cut up by the barnacles on the mooring chain that he could do no work for three or four days afterwards (Lyle, II, 615). The award, therefore, was too low in any event. But, if we have established our present contention that the master's judgment in going outside was properly exercised, it follows that it *was* necessary for Lyle to work outside. When libelant first offered to prove the value of this work counsel objected to the evidence as "immaterial" (II, 618) and libelant, therefore, limited itself to showing that Lyle was paid $1,000 (Lyle, II, 618; Klebahn, II, 603). (In addition libelant had to pay the costs in Lyle's suit against it (Id.), but it is not charging claimant with this). Although no attack was made on the reasonableness of Lyle's bill, libelant recalled him to show affirmatively that the amount was reasonable (Lyle, III, 941), and here again counsel made no attempt to rebut this showing but was content with evidence that the cost would have been less inside the harbor (Id., 949, 950). In view of the record, therefore, it is not open to claimant to contend that the charge of $1,000 was in any way excessive. and we submit that the award for this item should be increased to that amount.

An adoption by this court of our contention that there was no contributing negligence would, therefore, call for an increase in the award from $20,859.75 to $24,384.89. We now proceed to the contention that it should be

increased by $1,450 in addition, and this irrespective of whether the "Siberia" rightly proceeded outside the harbor and from there to Yokohama.

VI.

THE COURT IN ANY EVENT ERRED IN NOT ALLOWING LIBELANT THE EXPENSES OF REPAINTING THE "SIBERIA" AND IN AWARDING ONLY $200, INSTEAD OF $300, FOR THE SURVEYS.

The court, in making its award in this case, recognized the propriety of allowing libelant the money paid out for surveys on the vessel. It erroneously, however, looked to libelant's *first* bill of particulars in answer to the claimant's first interrogatory (I, 85; Decision III, 1040) instead of its later *amended* bill of particulars, showing a payment of $300 instead of $200 (I, 91). It is also clear from the proof that $300 was paid (Wallach I, 332, 333); the award, therefore, for this item should be increased by $100, the omission being plainly an oversight.

We submit that the lower court also erred in not allowing libelant the expense of repainting the "Siberia", found from the evidence to aggregate $1,350 (Decision III, 1038). On this subject the court said:

> "Although the libel does not specifically refer to the expenses of the repainting as a basis for damages, it might be regarded as within the general allegation of injuries caused by the negligence of the libellee. It certainly was necessary to prevent injury in the dry dock. Libellant's answer to the first interrogatory of the amended answer asking

for the items making up the damages prayed for, contains no reference to a claim for repainting. Testimony was however introduced by libellant, without opposition, showing the expenses of such repainting, aggregating about $1350. According to the testimony of Railton,—the libellant's auditor, the Siberia was customarily docked for cleaning and painting every fourth voyage; and according to Hamilton, Chief Engineer of the 'Siberia', she was usually docked every third voyage, and this was her thirteenth voyage and she had not been docked since her tenth voyage. In view of this evidence I do not find that the repainting is an equitable charge against the libellee. It *may be that the 'Siberia' would have been docked at that time* in the regular course of things for cleaning and painting, if the other cause for docking had not arisen. Such action was due either then or at the end of the next voyage. The necessity of painting, which developed, was equally an opportunity, as the 'Siberia' thereby escaped the usual dockage charges which would range from $2256.80 to $4513.60. This point suggests a wide field of conjecture; for instance to take one proposition, if the evidence had shown that the 'Siberia' *would have dry-docked at such time* for painting, would libellant be entitled to dockage fees for more than the surplus time for repairs?''

(Decision III, 1038, 1039.)

Here again the court starts out wrong in saying that there is no reference in libelant's bill of particulars to a claim for repainting; forgetting that an *amended* bill of particulars was filed before the trial making such claim (I, 91). Hamilton's testimony as to the usual custom of docking the ''Siberia'' for painting every third voyage is obviously not meant to be exact (Hamilton, I, 228-232), and he did not know whether it was the intention

of the libelant to dock her after the particular voyage in question or not, saying "that is all left to the management of the company" (Id., 228). Mr. Railton's testimony that she was docked every *fourth* voyage was also not intended to be definite (Railton, I, 341, 342); while Mr. Schwerin testified that there was no rule for the docking of the "Siberia" or any other ship

> "other than that we endeavor to keep their bottoms clean and prevent corrosion."
>
> (II, 405, 406.)

The court, in its opinion quoted, recognizes that the evidence makes it problematical whether the "Siberia" would have been docked at the time for painting, and that is the point we wish to make here,—*the "Siberia" might or might not have been docked after the voyage in question.* As already has been said, when an outlay which was but discretionary is made a necessity through the wrong of another it should be recovered. To put a simple case as illustrative of the principle: A shoots B who is compelled to go to a hospital, and the latter sues A for his hospital expenses. A defends on the ground that while convalescing B recovers from a nervous breakdown from which he was suffering at the time he was shot, and which in all probability would have forced him to go to the hospital irrespective of the shooting. To state such a defense shows its absurdity, yet it is quite the defense of the case at bar.

In the case of the H. M. S. Inflexible, Swabey, 200; 201, the court says:

"It appears to me, however, that the incurring of such expense in ordinary cases is purely optional, and most clearly is not a matter of necessity but one of expediency, which may or may not be adopted according to the judgment of the master, and according to the state of the wind and weather, and indeed other circumstances. The vessel being disabled by the collision, the employment of the tug was a matter of *necessity,* but if there had been no collision there would have been an option of employing the tug or not as he liked. I am of opinion that a merely probable or discretionary outlay cannot be deducted from a charge made indispensable by the collision."

Aside from the question of discretion, the record further shows that the repainting of the "Siberia" was not at the time a necessity.

"Q. What was the condition of her bottom when she came in there, with reference to being foul or otherwise?

A. Well, it was not as bad as usual.

Q. It was considerably foul, was it not?

A. Nothing at all serious; not at all serious to cause any docking for that purpose.

Q. In the usual course of her business she would have had to go into drydock in order to paint her bottom?

A. No sir, not in the condition she was in.

Q. She would not probably at that time, but before long she would have required it?

* * * * * * *

A. She would have run a year. She might have run six months. It is according to what water a vessel is in.

Q. She might have run two or three months. It depends on circumstances?

A. Yes sir.

Q. She was I understand considerably foul but not sufficient to warrant docking for that purpose?

A. Nothing at all to warrant docking for that purpose.

(Watson, I, 295, 296.)

"Q. Now, in reference to the painting of the bottom of this vessel. She was foul was she not when she went there?

A. No, sir, she was in pretty fair condition.

Q. When you say she was in pretty fair condition she was still foul to a certain extent though probably not as foul as she might be?

A. As far as my recollection brings me the ship was fairly clean when she came on the dock. I would not have dry-docked her for painting.

Q. I am not asking you whether you would have dry-docked her for painting; I am asking you what the condition was even though it was not severe enough to dry-dock her for painting. She was foul to a certain extent, was she not?

A. I don't think so.

Q. You do not think so?

A. No sir.

(Evers, I, 321, 322.)

See also

Stewart, II, 392.

It has been definitely decided by the House of Lords that where, for the purpose of making repairs for which underwriters are responsible, a vessel is put in dry-dock and, while there, the owners have her surveyed, the entire cost of dockage must be borne by the underwriters.

(*Ruabon S. S. Co. v. London Assurance,* 9 Asp. M. C. (N. S.) 2). In this case Lord Brampton, at p. 6, says:

"The Ruabon was dry-docked solely to enable the underwriters to effect the repairs for which they were liable and with no other object, and no other repair was, in fact, done or required to be done on the ship; the survey of Lloyd's surveyor was in no way necessary for any purpose connected with the work performed on the vessel, but was only made to entitle the owners to reclassification at Lloyd's, and need not have been made at that moment, nor at any particular time, so long as it was made within the time limited by Lloyd's rules, which had then nine months to run. It is quite true that if it had not then been made it would have been necessary if she were afterwards surveyed to have incurred the expense of again dry-docking her at the owner's expense, and to that extent the owners might have been benefited. I say might, because the owners might have sold the vessel in the meantime, or some other thing might have occurred to render such survey unnecessary. Assuming, however, that the expense of another dry-docking was in this way saved, and that to that extent the owners were benefited, I think that circumstance immaterial, and it does not warrant a claim for contribution towards the dock dues imperatively incurred on the underwriters' account in the discharge of their obligations."

See also

The Acanthus, 9 Asp. M. C. (N. S.) 276 (a collision case).

In both the cases last cited it will be observed that the thing done by the owner while the vessel was in dry-dock was totally disconnected with the immediate cause which led to the docking, and that the dispute in both cases involved the contention that the owners, having received a benefit arising through the docking of the vessel, should share in the cost of docking. In the case

at bar, the question goes further and involves the cost of the thing done for which the owner received some benefit. In deciding this question there is presented a somewhat different but well recognized principle of law. In cases of collision the libelant is entitled to a restitutio in integrum and, therefore, its right in this case is to have the "Siberia" returned to it in the same condition that she was in before fouling the dredge's wire. At the time of the accident the anti-fouling paint on the "Siberia" had not been destroyed, but the accident made necessary the docking of the vessel and the docking necessarily destroyed the anti-fouling paint. Applying then the principle of restitutio in integrum, the libelant is entitled to receive its vessel back from the dry-dock with her paint as it was before the accident irrespective of any contention that she might have been docked at that time for repainting.

In the case of *The Bernina* reported in 6 Asp. M. C, (N. S.) 65, at p. 67, the court says:

> "It is clear that a person who has had an injury done to his property is entitled to have it restored to him so that it may be used by him as effectually as it would have been if it had not had damage done to it. I entirely assent to the proposition that Mr. Barnes has urged, that because the doing of repairs which have been rendered necessary by the collision procures an advantage to the owner of the damaged property, it is not to be taken into account by way of diminishing the amount which the wrongdoer has to pay in respect of that which is necessary to put the damaged property in the condition it was in before."

It will be noted in the case last cited that the question involved repainting the inside of the ship.

See also:

Spencer on Marine Collisions, p. 356.

In the case at bar the undisputed evidence shows that but for the wrong of the claimant there would have been no *necessity* to repaint the vessel. That wrong alone, through the necessary sequence of events, created the necessity. The doctrine of restitutio in integrum was recognized by this court in the case of *The Rickmers,* 142 Fed. 305; 309.

We submit that the trial court erred in this matter, and that libelant's award should be increased by the sum of $1,350 paid by it for repainting the "Siberia". This, together with the omitted $100 for the surveys and the other additions discussed under our last heading, brings the total award to $25,834.89. This amount compensates the libelant for the injury done, and it would receive in such an award no more than compensation except the problematical gain to be found in the difference in value between the life of the new paint on the vessel's bottom and the life of the old. That question, however, is not open for determination.

VII.

EVEN IF THE LOWER COURT'S FINDING AS TO LIBELANT'S CONTRIBUTORY NEGLIGENCE IS CORRECT, ITS APPORTIONMENT OF THE DAMAGES ON THE ITEMS FOR REPAIRS, DOCKAGE AND DEMURRAGE, THOUGH BASED ON CORRECT LEGAL PRINCIPLES, IS TOO FAVORABLE TO THE CLAIMANT, AND THE AWARD SHOULD BE INCREASED ACCORDINGLY.

If the court finds it necessary to go into this subject, the very difficult and technical question presents itself as to *what* injuries occurred on the trip to Yokohama, and here again the evidence to be considered is solely that of libelant's witnesses, the claimant offering none on the subject.

The lower court's findings in this connection were as follows:

> "It is contended by counsel for the claimant that the damage to the blades of the propeller was entirely caused on the trip from Honolulu to Yokohama by the projecting ends of the wire cable, which had been severed by the diver in Honolulu and left projecting, which were struck by the blades at every revolution. As intimated above, I am not able to find that this cause was responsible for more than the injuries which were found within about eighteen inches of the hub. Those beyond the eighteen inches, in which the edges of the blades were broken or toothed were apparently caused by the propeller striking the chain at the time of the fouling, or it may be by wrapping it around the blades with great force.
>
> "In addition to these were the injuries to the nuts fastening the propeller, and to what is called the propeller glands, which, in all probability, were caused both by the heavy strain on the chain or wire

cable or both at the time of the fouling, and also by the revolutions of the propeller causing friction with the protruding ends of the wire cable. It is not possible to segregate exactly the injuries to the propeller blades, to the nuts for fastening them to the hub, which had to be renewed, and to the packing gland on the forward side of the propeller hub, which also had to be renewed, which were caused at the time of the fouling, from those caused on the voyage from Honolulu to Yokohama by the loose ends of the wire cable as testified to. I can do no better under the evidence, than to attribute one-half of such injuries to each of the said causes respectively, according to the rule of damages in admiralty, and so find. The Serapis, 49 Fed. Rep. 393, 397-8.

"The claim is made by the defense that the other injuries which resulted to the 'Siberia' after leaving Honolulu, in relation to the fouling of her propeller, were not the direct result of the fouling but of an intervening cause, to wit: the continuance of the voyage to the Orient and back to San Francisco; and cites Scheffer v. R. R. Co., 105 U. S. 249, Goodlander Mill Co. v. Standard Oil Co., 63 Fed. Rep. 400, and Jenks v. Wilbraham, 77 Mass. 142, in support of its contention. So far as the continuance of the voyage from Honolulu to Yokohama is concerned, the point is not well taken, inasmuch as there are no facilities at Honolulu by means of which the injuries could have been examined and repaired. The 'Siberia' was justified in proceeding with her freight and passengers to the next port on her schedule, and that was the course most favorable to the libelee in the matter of damages, as the other possible course,—her return to San Francisco for dockage and repairs, would have involved expenses in relation to conveyance of the mails, passengers and freight to their destination by another vessel, with the probable delays incident to such an enterprise, which must inevitably have been far beyond the comparatively minor expenses caused by

her own continuance of the voyage. The negligence of the libellee was the efficient cause of all injuries resulting from the fouling, including those which necessarily occurred by reason of the continuance of the voyage, so far, at least, as to be within reach of dockage facilities, and it is liable therefor, except the damage caused by the loose ends of the wire cable, which might have been removed in Honolulu.

"At this point the question arises as to the liability of the libellee for such injuries as were caused on the return trip from the Orient to San Francisco, for it appears by the testimony of Mr. Beaton, on cross-examination, who was the superintendent of the San Francisco dry-dock, that he thinks there were facilities for dry-docking in China or Japan and that the 'Siberia' had been dry-docked there on a former trip. He is not sure about this but says, 'I think there are, but I don't know. I am pretty sure she was on there. Certainly I don't know, but that is my impression' (Beaton, p. 125). "Neither side carried this point further. The above testimony is, to my mind, hardly definite enough to justify the court in holding the libellant to the responsibility for such injuries as may have resulted from the continuance of the voyage to San Francisco without going into dry-dock in 'China or Japan'."

(Decision III, 1034-1037.)

Referring to the last point of this quotation first, we submit that it is already covered by what has been said as to the propriety of making the trip to Yokohama. Also, as the lower court well says, there was no sufficient showing by the claimant that there were proper dockage facilities for a vessel of the "Siberia's" size in Japan or China. But however this may be, it is clear that libelant took the right course in this connection. After the removal of the wire at Yokohama it was evi-

dent that little, if any, further damage could result from the voyage home, and in preference to breaking up the steamer's schedule in a foreign port which would have entailed much additional loss and expense, it was wise and appropriate that she should return to her home port for permanent repairs. See *The Benj. F. Hunt, Jr.*, 34 Fed. Rep. 816. We do not think that this matter calls for further comment.

Claimant's only basis here and in the lower court for its contention that the principal damage happened on the trip to Yokohama is certain evidence given by Mr. Lyle. Lyle testified that he did not see the guard on the "Siberia's" shaft; that he examined the top propeller blade and saw nothing wrong with it; that he never saw the shaft at all, and that he could not get his fingers underneath the shaft covering or guard, and he could not tell whether there was any wire inside. He also testified that, *so far as he could see,* the guard and the tube were intact (II, 731-733). It is on these last bits of evidence, and on these alone, that counsel bases his claim that the damage was done on the way to Yokohama and that hence the dredge was freed from responsibility. This claim, in our opinion, is unsound, rests on wholly impossible assumptions and leads to conclusions improbable, if not contrary to intelligent speculation.

For, if the wraps of the wire were taut when Lyle examined them, how *could* they have gotten in under the guard and on to the shaft on the voyage to Yokohama? No way can be suggested and we know of none. The

trouble is that counsel thought that because Lyle working under water at night time could not see and was unable to insert his fingers to feel any wire underneath the guard, hence there was none there. This method of deduction is illogical and inconclusive, as Lyle's negative testimony is easily explained by the positive testimony of Domei, and certainly this latter must be accepted in view of the improbabilities to which counsel's conclusions point.

Domei testified that there were no wires on top of the guard, but 20 wraps underneath (I, 112), that there were no wires wrapped around the guard (Id.), that the wires were wrapped around the shaft *while the starboard propeller was moving astern,* and that, if the wire became wrapped round the shaft in Honolulu, there would have been *no change* on the voyage to Yokohama, that he requested them to move the shaft while he was working on it and that the wire remained stationary and never moved *at all* (Id. 113-115). On cross-examination he further testified that the wire was on the top and bottom parts of the guard and that the wire was underneath the guard where it was crushed in (Id. 124).

It becomes clear, in view of this evidence, that the wire was wrapped round the shaft itself underneath the middle part of the guard through some great stress, while the starboard propeller was moving astern. This could not have happened while on the voyage to Yokohama; first, because, during such voyage, the starboard propeller was moving forward and not astern, and secondly, because the wire could not have changed its posi-

tion so as to have crushed the guard in without the subsequent application of some exterior force, evidence of which is lacking in this case. And, as we have already suggested, the fact that cut ends of the wire, the shackle and clamps, were found by Domei at Yokohama as Lyle found them in Honolulu is conclusive of our contention that the voyage made no change in the situation.

Domei's testimony is further supported by the uncontradicted evidence of Stewart, the surveyor, brought out on cross-examination. He testified that the wire *must* have gone in to begin with, because it would go in when it had a heavy strain on it, and there was no reason why it should have gone in afterwards (II, 388, 389). This evidence accords with an intelligent consideration of the facts.

Furthermore, the slowing down of the starboard engine when the wire was first picked up shows that the strain was on the shaft itself at the time (Hamilton, I, 209), for had the wire been simply on the guard there would have been no strain on the shaft and consequently no slowing down of the engine. And again, how can it be accounted for that the starboard engine *throughout the entire voyage to Yokohama* made one revolution less than the port, except for the reason that the wire was tightly wrapped round the shaft itself and remained unchanged in its position there throughout the trip? In spite of Lyle's testimony, we know that when Domei removed the guard at Yokohama, and when it was again removed in San Francisco, it was distorted and

bent, and what conceivable strain or force bent it on the voyage to Yokohama? Every common sense consideration points to the fact that it was bent when the strain, which was great enough to part the large mooring chain, was put on it in Honolulu. It is hard to conceive of a possible transformation of conditions on the voyage to Yokohama that would bend in the guard, allow the wire to work itself under it and onto the shaft (on a stern movement of the propeller) and yet leave in their original positions, as found by Lyle in Honolulu, the clamp, shackle and the two cut ends of the wire.

The following main facts, then, lead inevitably to the conclusion that the wire got inside the guard and onto the shaft at Honolulu and at the very time when it was first picked up:

(1) There was a great strain at that time on the guard and none at any other.

(2) The starboard engine slowed down at the time of the accident, indicating friction on the shaft, and went ahead again when the chain broke.

(3) The starboard engine made one revolution less than the port from start to finish throughout the entire voyage, and at Yokohama the wire remained stationary when Domei had the shaft turned.

(4) The "Siberia's" starboard propeller was moving astern at the time of the strain in question and the wire was wrapped while the wheel was backing.

(5) For the guard to have been bent on the voyage, some exterior force or strain must have been applied from the exterior and none is shown or even suggested.

(6) The relative positions of the two cut pieces of the wire and the clamp and the shackle were the same at both Honolulu and Yokohama.

The claimant produced no evidence on the point for which it contended, but set up as against the foregoing salient facts:

That Lyle, who did not see the guard at all, testified that, *so far as he could see*, the guard and the shaft were intact, and that he could not get his fingers underneath the guard.

In other words, libelant produced facts against negative possibilities, and we submit that the fair exercise of judicial consideration can lead to but one conclusion under those circumstances. If the dredge's wire fouled the "Siberia's" propeller, is the dredge to escape on the pure conjecture, indulged in despite established facts and common intelligence, that the wire through some unimaginable hocus pocus got underneath the guard on the voyage to Yokohama?

The next question to be touched on is the damage to the propeller blades, which, counsel claimed, must have been done on the voyage. Lyle testified that the cut ends of the wire would touch the propeller blades, but, in his opinion, would not hurt them (II, 617); that he examined the top propeller blade and it *appeared* all right (Id. 622), and that he felt all the edges of it; that he stood on the propeller hub and that the blade itself would extend upward about six feet from the hub (Id. 631). Ergo, says counsel, the blades were damaged on

the voyage and not in Honolulu. This inference also wholly fails.

Lyle himself testified that in his opinion the blades would not have been hurt on the voyage (II, 617, 622). Domei testified that the blades were damaged by coming in contact with some "hard thing", "*a strong force*" (I, 141). Watson testified that the edges of the blades were "*knocked out*" (I, 297). Evers testified that on the leading edges of the blades there were indentations in the shape of crescents (I, 303); that the blades had a number of pieces gone from the leading edges (Id. 307); that the "Mongolia's" blades, damaged *by a chain,* were similarly injured (Id. 308, 309); that it was not possible to have knocked the indentations in question into the blades by the mere loose wire, because the wire would not be stiff enough to do it (Id. 317), and, corroborating Lyle, that he thought *the chain* made the indentations because it was such a solid mass "like the "butt of a hammer" (Id. 318). Stewart testified that the leading edges of the three propeller blades were chafed and flattened off for about a distance of eighteen inches from the hub (II, 385); and that the damage to the propeller blades was probably done when the wire and chain were first picked up (Id. 389).

Here again, the claimant offered no testimony, expert or otherwise, but relied wholly on the honesty of libelant's witnesses. All the facts point to the conclusion that the damage to the propeller blades was done at the time of the accident; that it *could not possibly* have been done on the voyage to Yokohama, and that the chain and

not the wire was the cause of the injury. We submit that Lyle's examination of *one blade* at night, from a precarious footing under water on the propeller's hub, cannot affect this clear evidence, especially where it appears that the injury was to the lower part of the blades near the hub, which Lyle might easily have overlooked or but indifferently examined. Moreover, slight inconsistencies in evidence are inevitable in a case like this, and how can Lyle's negative testimony as to one blade prevail against the positive evidence referred to? The evidence of the other witnesses was based on a careful examination, with plenty of time to make it, while Lyle's attention was almost solely directed to a removal of the wire while he himself was in a position of great discomfort, danger and peril. In the harbor at Honolulu the heavy anchor chain of the buoy was found by Lyle on his first inspection to be *hanging over one of the propeller blades* (II, 609, 621), and lower down wrapped seven times around the propeller "sleeve" (Id. 608). This was the situation when the starboard wheel was stopped and it shows that during the process, when the flying propeller was doing the work that brought the chain around the steamer's shaft, it was in contact with the chain itself. What must have resulted to the rapidly revolving bronze blades through contact with the inch and three-quarter anchor chain of the buoy, and especially at the moment when the stress was so great as to part the chain, is too obvious. To say "nothing" resulted to the blades is to state the ridiculous. On the other hand, the flexible, elastic, pro-

truding ends of the wire cable, even though coming in contact with the propeller blades, would, in comparison to the chain, have affected them but little.

We do not see how any other finding is possible than that the injury to the propeller blades was done before the "Siberia" started for Yokohama. No plausible reason can be suggested to show that it *could* have been done on the voyage. And we say this with due respect for the opinion of the lower court on this subject. In getting an equal division of the damages to the propeller blades the claimant got all (and, in our opinion, more than all) it had any right to expect.

The questions as to the wire getting round the shaft and the blades being injured on the voyage were, naturally, the two main points in the case on this branch of the subject, and little attention was paid by either side in the lower court to any other injuries. The remarks applicable to the propeller blades apply to the injuries to the nuts fastening the propeller to the hub and the packing gland. Here again the evidence of the three surveyors would seem to show that by far the greater part of the injuries were caused at the time of the accident and not on the voyage to Yokohama, and the claimant is fortunate in only being charged with one-half of these damages. The main expense was, of course, the drawing of the shaft and that was clearly made necessary by what happened in Honolulu.

We do not care to prolong this subject of the damage which may have occurred on the trip to Yokohama. It requires a study of the evidence of only six of the wit-

nesses (Lyle, Hamilton, Domei, Watson, Evers and Stewart), and we feel that this court can easily solve the problems presented, if it finds it necessary to go into them.

A subject closely allied to that just discussed is the necessity of docking the vessel and drawing the starboard shaft, *because of what admittedly happened in the harbor of Honolulu.* This point, in a sense, is separate from the previous discussion and, as the dockage is the principal item of damage and the drawing of the shaft is responsible for all but four of the fourteen items in the bill for repairs, we shall go briefly into the subject.

That it was *in fact* necessary to dock the vessel and draw the shaft admits of no discussion and counsel in the lower court did not contend that it did, so our inquiry will be directed to whether *the accident itself* made these things necessary. On this point we deem the evidence of the three surveyors conclusive. Watson testified that the vessel could not retain her class unless she was docked (I, 293) and that the shaft had to be drawn to ascertain its condition (Id. 287). Evers testified that even if the wire had been removed in Honolulu the ship would have to have been docked and the shaft drawn.

> "Q. Suppose that the ship had removed from her shaft the wire in Honolulu, and that had been the report made to you, would you still have ordered the ship docked?
>
> A. Yes sir, by all means.
>
> Q. Why?
>
> A. Because it had an unusual strain on it. It slowed the engine down. The divers had reported

that the blades were all chafed, and we would want to see it so as to approve it.

Q. You could replace the chafed blades without docking the ship?

A. But we could not see the shaft.

Q. What was the necessity of seeing the shaft from what you learned at the time that you ordered the vessel docked?

A. Because it slowed his engine right down with full steam on, and wound the buoy and wire right up under his counter.

Q. Why did you deem it necessary to see the shaft, having those facts.

A. Because we wanted to see if it was in any way strained, or the liners were loose.

Q. Is that always necessary?

A. It is always necessary.

Q. Did then the fact of the ship proceeding with the wire around the shaft from Honolulu to Yokohama enter into your determination to dock the ship?

A. No sir, it was the whole accident in Honolulu that determined us.

Q. Irrespective of the fact that she proceeded with the wire around her shaft from Honolulu to Yokohama?

A. Yes sir.

(I, 327, 328.)

The matter of the slowing down of the engine troubled counsel for the claimant a good deal in the lower court, but he there explained it with the blithe assurance that it *might have been* caused *by the propeller being in the mud.* But if the starboard propeller was in the mud, *where* was the port propeller? The port engine did *not* slow down, the starboard engine did; therefore, the starboard propeller was in the mud. Truly this sug-

gestion reaches the limit of humor, in view of the only too obvious reason for the slowing down of the starboard engine because of the strain on the starboard shaft.

On this point, as to the necessity of docking, we have also the testimony of Stewart who says that, even if the wire had been removed in Honolulu, he would still have recommended the dry-docking of the ship, because the shaft and propeller blades were subjected to an undue strain (Stewart, II, 387). He also testified that the propeller blades could not be efficiently removed unless the vessel was put in dry-dock (Id. 390).

We submit that the evidence conclusively shows that the "Siberia" had to be dry-docked and her shaft had to be drawn because of the fouling of the wire, and whether the wire was removed in Honolulu or Yokohama was absolutely immaterial. *The fouling of the wire was the proximate cause of dry-docking the vessel and drawing her shaft,* and claimant cannot escape it.

As to the rule for dividing the damages laid down by the lower court, we submit that the claimant has nothing to complain of. In charging the claimant with only *one-half* of the injuries to the propeller blades, nuts and packing gland, the court possibly treats libelant more severely than the evidence justifies. Perhaps, however, it was the only practical method of handling the subject, although it seems to us that it might have been said that the injuries produced by a continuance of the voyage were so infinitesimal as compared with the injuries inflicted at the time of the accident as to justify no

deduction. As the damages in question could be segregated from the other damages, we think the court was clearly right in so segregating them and only charging libelant with one-half of the damages for which it could be held partly responsible.

See court's Decision III, 1039, and cases there cited.

We affirmatively submit, however, that the court's *segregation* of the portion of the damages for which libelant was partly responsible is *clearly wrong*. It assumes that the cost of repairs to the propeller blades, propeller hub and propeller gland, was represented by divisions 1, 2, 10, 11, 12, 13 and 14 of libelant's Exhibit 6 (bill of Union Iron Works, III, 1081-1084; Decision, Id., 1041).

It also figures out that the number of hours spent as to *these items* was 22 per cent of the whole and hence charges the libelant with 11 per cent of the dockage and demurrage charges (Decision, III, 1040). Items 1, 2, 10 and 14 were as follows:

1. Took three blades off starboard propeller hub.
2. Took starboard propeller hub off shaft.
10. Replaced starboard propeller hub on shaft.
14. Replaced three blades on starboard propeller hub and cemented over nuts at base of blades.

It is very apparent, from a mere statement of these items, that they were made necessary solely *by what happened in Honolulu and,* like items 3, 4, 5, 7, 8 and 9, were connected with *the drawing of the shaft.* And the three surveyors testified, as before pointed out, that

this was necessary because of what happened *in Honolulu*. In fact, that was the very purpose of dry-docking the vessel. How the shaft could have been drawn and replaced without doing the work shown by items 1, 2, 10 and 14, as above enumerated; it is impossible to see. It is, therefore, clear beyond question that these items should not be charged up to the libelant. The trouble is that the lower court has confused the *repairs* made necessary to the injuries for which it held libelant partly responsible with the *removal and replacing* of the parts so repaired, which removal and replacing were made necessary by the original accident.

The only other items left are Nos. 11, 12 and 13, and all are minor ones. (Number 6 is covered by the court's opinion as an injury for which libelant was not responsible.) This leaves only items 11 (Made 8 brass nuts for bolts holding propeller blades on starboard hub), 12 (Renewed packing gland on forward side of starboard propeller hub) and 13 (Turned off edges of three starboard propeller blades) as items for which libelant could be held in part. The cost of these three items was only $310.76, and we submit that libelant should be charged with only one-half of this sum or $155.38, instead of half of $869.46, which improperly includes items 1, 2, 10, and 14. By parity of reasoning it will be seen that the *time* spent on these three items was only 4 per cent of the time employed on the whole work, instead of 22 per cent of such time, and that libelant should, therefore, only pay 2 per cent of the charges for docking and demurrage instead of 11 per cent. This

would amount to only $318.65 for the dockage and $68.69 for the San Francisco demurrage, and these sums, added to the $155.38, for the repairs would total $542.72. We submit, therefore, that, even accepting the court's conclusions as to libelant's contributory negligence and the results caused thereby, the court was wrong in its deductions and these should be reduced to $542.72, thereby increasing the award by $2,022.42.

THE INTEREST AWARD ON THE DAMAGES.

We had prepared an argument as to the propriety of the court's allowance of interest in this case, but as no point was made by counsel as to this matter, either in his brief or oral argument, we do not deem it necessary to further refer to the same.

In conclusion we submit that the wire which fouled the "Siberia's" propeller was clearly shown to belong to the dredge and that, in any event, the findings on this subject are conclusive under the circumstances of this case. We submit that the cases clearly establish that it was negligent to leave the wire where it was left. We further submit that libelant was guilty of no contributory negligence in proceeding outside the harbor and to Yokohama, but that, at the very most, these errors, if they were errors at all, were mere errors of judgment which should not relieve the claimant whose initial negligence was quite sufficient to account for all the evil results which followed. Apart from this question, and in any event, we submit that libelant should be allowed the expense of repainting the "Siberia" and

$100.00 additional for surveys. We next submit that even if the court's findings as to libelant's contributory negligence are correct the award, though based on correct legal principles, is too favorable to the claimant and should, for reasons heretofore set out, be increased by $2,022.42. We finally submit, however, that the award should be increased to the full amount claimed ($25,834.89) because of the lack of any contributory negligence on the part of libelant, and the erroneous action of the court in not allowing it the expenses of the repainting and the extra survey. If this final view meets the approval of this court, then, we ask that the decree be modified so that the award covering the actual damages be increased to the sum of $25,834.89, plus the interest allowance and costs, and that as so modified the decree stand affirmed.

Dated, San Francisco,
October 14, 1910.

E. B. McClanahan,
S. H. Derby,
Proctors for Appellee.

No. 1866

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

THE NORTH AMERICAN DREDGING COMPANY (a corporation), claimant of the Steam Dredge "Pacific", her engines, machinery, boilers, etc. (libelee),

Appellant,

vs.

THE PACIFIC MAIL STEAMSHIP COMPANY (a corporation), (libelant),

Appellee.

REPLY BRIEF FOR APPELLANT.

NATHAN H. FRANK,
IRVING H. FRANK,
Proctors for Appellant.

Filed this.....day of November, 1910.

FRANK D. MONCKTON, Clerk.

By.....Deputy Clerk.

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REPLY BRIEF FOR APPELLANT.

I.

The Damages.

In the discussion of this question, the appellee lays great stress upon what he contends was good judgment in taking the "Siberia" to the outer harbor after the accident, rather than to have warped her to the wharf for investigation and repair. It is said:

> "It was perfectly obvious that the vessel could proceed in safety to an anchorage at the mouth of the harbor without using her starboard propeller,

> which was the one known to be in contact with the obstruction. A movement in any other direction than forward would have incurred further danger, and as far as the suggestion of warping is concerned, we submit that warping a vessel of the 'Siberia's' size to the dock in broad day light would have been no easy undertaking,—how much greater the difficulty and danger of doing so with the vessel in a crippled condition and darkness approaching. (It will be remembered that the wire was picked up about 5:30 P. M. and that it was near the end of the year.)"

We submit that there is no warrant in the record for the suggestion that it would have been dangerous to have warped the vessel to the wharf. As stated by the District Court, "the ship was within a few hundred feet "from the wharves" (p. 1033). Neither, if we are permitted to indulge (as libelant does) in judicial knowledge upon the subject, is it a fact that it is a dangerous operation under any circumstances. Lines are carried from the ship to the wharf, and then by the use of the ship's donkey-engines she is slowly and gradually drawn in to the wharf.

We are not advised whether 5:30 P. M., *in that southern latitude,* at that season of the year involves the near approach of darkness,—we rather think it does not. But whether dark or light, the operation in question is one of such slow and easy nature that that condition would have very little effect, particularly in view of the handy use of searchlights on these vessels. We are also satisfied *from the testimony* that that proceeding involved no difficulty. Lorentzen, himself, suggests none. He admits it as a perfectly feasible alternative that would avoid

the necessity of using either the propeller or the tug-boat (p. 569). Libelant refers to this as "meager evi-" dence on the subject of the warping of the vessel " (not followed up in anywise by the claimant)"; but it is clean-cut, undisputed and conclusive. Then why follow it further? We think that should, and does, dispose of the contention (which has no foundation) that it would have been dangerous to have warped the vessel to the wharf.

But the mere question whether or no said vessel had *at that time* been warped to the wharf is not decisive of the *whole* discussion. The material fact is that she did not come to the wharf and remove the wire *either* at that time *nor after she had removed the buoy at the anchorage outside,* but on the contrary proceeded on her voyage with the wire on the propeller tube. She could, without any danger, have returned to the wharf *after the buoy was removed,* either by the use of a tug, or by the use of her port propeller. The great damage, as we have already said, was incurred by proceeding upon her voyage without first removing the wire. If, therefore, the appellee be correct in his suggestion that it was good judgment to proceed to the outer harbor rather than to immediately warp the vessel to the wharf, he would nevertheless not have advanced a single step in the argument.

The libelant seems to think that "the Court's finding " as to the propriety of proceeding to Yokohama rests " mainly, if not entirely, on the unnecessary action in " taking the 'Siberia' outside of the harbor". Upon

this libelant founds the suggestion that if the facts concerning the movement to the outside harbor were not sufficient to charge libelant with negligence, the facts respecting his proceeding to Yokohama necessarily leads to the same conclusion, or, as he phrases it: "The basis of the second finding goes by the board" (p. 85).

This argument is founded upon a misapprehension of the meaning of the District Court. By the term "ruling" as used by the Court in the quoted sentence, was meant the decision, based on the finding that the vessel could have gone to the wharf and had the buoy removed there, that "the libelant is not entitled to charge for the spe- " cial costs of such services which were unnecessarily " made outside the harbor" (p. 1033). If the Court be right in that ruling, it necessarily follows that it "affects " also its responsibility for such injuries as may have " resulted by its continuation of the voyage without re- " moving the wire from the propeller shaft", because they likewise were unnecessarily incurred by libelant.

So, too, the suggestion of the libelant that the act of the master was "the adoption by him of necessity *of one of two perilous courses*" (p. 83), is an essential element in libelant's argument, but there is no fact before the Court to warrant the suggestion. What were "the two perilous courses" between which he had to choose when first called upon to act? What are the "two perilous courses" between which he had to choose before proceeding to Yokohama? There is no foundation for this suggestion of an error *in extremis*. The safe and prudent course to have been pursued at either

of the above mentioned points, is apparent to any one. The master must, in proceeding upon the voyage, have been over-influenced by a desire to *make time;* and such is now practically *the only argument urged on this Court in its favor.* This brings us to a consideration of appellee's argument in favor of

PROCEEDING UPON THE VOYAGE TO YOKOHAMA.

Appellee's endeavor to justify this act appears to us to be full of incongruity, suggestions of fact that, if true, should not influence the judgment, and quotations from cases that, to our mind, are inapplicable to the present situation.

Mr. Lyle is quoted as having reported to the master that he had left the protruding ends of the wire so that they *would touch* the propeller, but in his opinion would not hurt the propeller.

> "Well I knew that they would touch the propeller when the ship went ahead but these two ends would come aft, and as it revolved would strike it, but would not hurt the propeller."

Now, it will be remembered, that Lyle was a diver, and not a navigator. His opinion, therefore, that the ends of the wire would not hurt the propeller, is not the opinion of one upon whom the master was entitled to rely. His knowledge, however, that it *would strike* the propeller, was sufficient to warn the master that he *should not take the risk* of the damage that might possibly ensue. His duty required him to look to the *fact* that it would strike the propeller, and not the divers *opinion as to its effect.*

So, too, the test made by the engineer, was not a test under conditions such as could be reasonably expected to illustrate what would happen on the voyage.

> "I moved her, *backing, just by swinging the link.* I then had the first assistant engineer do it, and I went back and listened at the stern to see if I could hear any unnatural noise. There was nothing, and I suggested that we proceed to Yokohama" (p. 214).

But moving the engine by just swinging the link *while the vessel is at anchor,* is a very different condition from that to be anticipated on a voyage where for some two weeks the propeller would be running at full speed and *in the opposite direction.*

It seems to us clear, that both the master and the engineer were negligent in the performance of their duty in that connection.

Some stress is laid upon the fact that the "Siberia" at the time was carrying the United States mails, that she had a cargo worth $1,000,000 on board, and many passengers (p. 88) and it is said that

> "under the circumstances the only logical course was for the vessel to proceed on her voyage and fulfil her obligations to the United States Government, her consignees and passengers, and prevent demurrage from piling up."

But these facts only tend to enhance the negligence. The obligations to the United States Government did not require her to endanger the loss of the mails; her obligations to her consignees and her passengers did not require her to take the risk of the loss or damage to either, or both, and the suggestion concerning demurrage

is frivolous. This demurrage is fixed at the rate of $858 a day, and it is said that had the work been done at Honolulu it undoubtedly would have taken much longer to accomplish, as there was only *one diver* to do the work there which took *three divers* three days to accomplish in Yokohama (p. 89). In other words, to avoid a possible nine days' demurrage, but which Lyle testifies and the Court finds (p. 1034) would have been but *three* days' demurrage, the master is said to have been justified in taking the great risks which he took on this occasion, and which in fact resulted in very great damage.

We say that these conditions do not require an expert knowledge to insure the condemnation of the master's act; they appeal unerringly to a man of ordinary prudence as having been an act of great negligence.

But appellee's entire argument upon this subject is also based upon two erroneous legal assumptions. In the first place it is suggested "that the question is not " whether it was in fact the wisest course to proceed to " Yokohama, but whether so doing constituted *a reason-* " *able and proper* exercise of the *master's discretion*" (p. 89). In other words, the master is not to be adjudged negligent because it is said he exercised an honest judgment or an honest discretion in the matter. This position, however, is clearly against the law.

While it is conceded "that negligence must be deter- " mined upon the facts as they appeared at the time, " and not by a judgment from actual consequences when

"they were *not to be apprehended by a prudent and "competent master"*, nevertheless (and this is the judgment of the Supreme Court),

> "It is a mistake to say as the petitioner does" [in this case the appellee does] "that if the man on the spot, even an expert, does what his judgment approves, he cannot be found negligent. The standard of conduct, whether left to the jury, or laid down by the Court, is an external standard, and takes no account of the personal equation of the man concerned. The notion that it 'should be co-extensive with the judgment of each individual', was exploded, if it needed exploding, by Chief Justice Tindal, in VAUGHN v. MENLOVE, 3 Bing. N. C. 468, 475. And since then, at least, there should have been no doubt about the law."
>
> OCEANIC STEAM NAVIGATION COMPANY v. AITKEN, 196 U. S. 596.

As already suggested, the situation of the steamer at that time, with her great value, and many lives in charge, was such that no *ordinarily prudent man* would have taken the chances which *he must have known were possible.*

It has been suggested by appellee as a difficulty under which it labors in the case, that the master is dead. As a matter of fact the master committed suicide on that very trip, after the vessel had arrived at Hong Kong. That would tend to indicate that he was not mentally in a situation to exercise a prudent judgment.

The other mistaken legal principle upon which appellee proceeds, is, that the burden of proof respecting these damages is upon the appellant. It is said:

"One party cannot be allowed to get another into trouble and then complain that in the emergency caused by his fault the best judgment was not used by the injured party.

"Furthermore, as having some bearing on the subject last discussed, it is entirely as to what damages happened to the 'Siberia' on the way to Yokohama, if any at all did, and can the claimant, which initiated all that followed, be heard to deal in conjectures? But for the claimant's negligent act no damage would have happened, and is it not rather for it to respond than to attempt to cast the burden on the libelant?" (pp. 98-9).

We may add to this statement of appellee the fact that *its* entire proof respecting the cause of the damage is conjectural; that there is no evidence, worthy of the name, that any material damage occurred to the steamer *by the initial act of picking up the cable.* On the contrary, all the evidence, as we think we have already shown in our opening brief, tends to show that practically all of the material damage was the result of subsequently proceeding upon the voyage.

With this in view, we recur to a former case decided by this Court some six months ago, where we ourselves urged upon this Court the above quoted consideration relied upon by the present appellee, and the reply of this Court in that case seems to us to dispose of the present appellee's entire contention. We refer to the case of

California Navigation & Improvement Co. v. Union Transportation Company, 176 Fed. 535, where this Court quoted from one of its previous decisions upon the question of damages, which quotation concludes with the following proposition:

> "But this allowance in a collision case is subject to the general rule that damages which are uncertain, contingent, or speculative, cannot be recovered, and under this rule it has been held that there is uncertainty when the nature of the damage cannot be determined. It follows that to recover damages over and above repairs for actual cost or permanent depreciation, the nature of such damages must be clearly established and not be left to speculation and uncertainty."

The Court deemed the rule applicable to the case then before it, and added:

> "In this connection, it is to be observed that the onus probandi rests upon the party demanding compensation, *to prove his loss and the facts necessary to be ascertained and considered by the court in fixing the* DEFINITE SUM *to be awarded*" (p. 535).

It will be remembered that in that case the vessel was sunk in a collision, and evidence was introduced by the respondent to prove that the libelant did not proceed with good judgment in his efforts to raise the vessel, and it was suggested that further damage was incurred by reason of this lack of judgment.

The finding of the lower Court upon the question of damages was reversed because the libelant had, in the opinion of this Court, failed to give evidence "as to her " value or condition in the situation in which she was " *immediately after the collision* and the reasonable cost " of her restoration". In that case, also, to use the present appellee's phrase (Brief, p. 99),

> "The claimant's fault was positive and distinct, while that of the libelant was, at most, a mere error of judgment."

Accepting, as we do, the rule laid down by this Court in that case as the law in this circuit, it seems to us to be a complete answer to the proposition urged in this case by the appellee.

We have said that the cases cited by appellee have no application. Aside from the fact that they do not accord with the above judgment of this Court, we have the following special suggestions to make respecting these cases.

In the case of

The City of Macon (Appellee's Brief, pp. 90-91), we have not only a state of facts materially different from those in the case at bar, but the concluding sentence, italicized by the appellee in his brief, emphasizes that. In that case it is said: *"The collision is sufficient to account for it all"*. In the present case, the picking up of the wire is *not* "sufficient to account for it all", for Lyle's testimony as well as Stewart's conclusively shows that much, if not most, of the damage here in question did not exist at Honolulu.

The case of

Stevens, Etc., Transportation Co. v. Western Union Telegraph Co., cited on page 92 of said brief, is directly against the appellee. It will be borne in mind that our contention in the present case is, that it was the *duty of the vessel to take the time necessary to free her propeller of the cable before proceeding upon her* voyage, and it is her failure so to do of which we are

complaining. In the case cited the Court, quoting the language of Dr. Phillimore, said:

> "that 'it was the duty of the ship, if possible, to disentangle her anchor from the cable without injuring it; she was bound to apply ordinary skill, and *to take the time necessary for this purpose,* unless she thereby exposed herself to imminent peril', I fully agree with. *Here the vessel took the time* and endeavored to free the cable without injuring it."

In the present case, the vessel did not take the time and endeavor to free the cable. That damage would most likely occur by such failure, should have been clearly foreseen.

The cases of the George L. Garlick (Brief, p. 93), and Alexandre v. Machan, do not refer to fault in incurring unnecessary damage, but refer to a *fault in navigation* which *tended to bring about* the collision—the initial damage.

In the case of The Narragansett (Brief, p. 93), the additional damage was the result of "efforts *directed alone to the saving of the wreck",* which is a very different thing from a *disregard of the injury* by the *injured party* proceeding upon her voyage with the wire in her propeller. Neither do we think it accords, in other respects, with the decision of this Court in the case of the California Navigation Co., above referred to.

In the case of Amoskeag Mfg. Co. v. The John Adams (Brief, p. 95), all the injuries were *apparently* above water and the pumps had just been sounded, and the extra damage was the result of *injuries then existing,*

but *unascertained.* Here the condition of the wire on the propeller *was known,* and it was deliberately allowed to enhance the injury.

Likewise The Albert H. Ellis (Brief, p. 96).

Greenwood v. Town of Westport, was a case of "erroneous act *through excitement* induced by defend-"ant's negligence". It has to do only with hasty and mistaken conduct in the face of danger, otherwise known as an error *in extremis,* which has no application to the present case.

APPELLANT'S ARTICLE VII, Page 110.

This brings us to a consideration of the argument of libelant made under the seventh heading of its brief, beginning at page 110, wherein he seeks to demonstrate that we should be held liable for the damages incurred on the voyage from Honolulu to Yokohama.

We have treated of this subject in our brief, and it will be remembered that at the end of said argument (pp. 42 to 65) we have quoted the testimony of Mr. Lyle in full, to prove that at the time of the removal of the buoy the wire was wrapped around the outer tube, and had not got under the guard, nor had it destroyed the guard, which, if true, leads to the inevitable conclusion that that damage which was found at Yokohama took place on the voyage.

Libelant's reply to this position is characteristic. He states our position in the following language (p. 113):

> "Claimant's own basis here and in the lower court for its contention that the principal damage happened on the trip to Yokohama is certain evidence

given by Mr. Lyle. Lyle testifies that he did not *see* [our italics] the guard or the Siberia's shaft; that he examined the top propeller blade and saw nothing wrong with it; that he never saw the shaft at all, and that he could not get his fingers underneath the shaft covering or guard, and he could not tell whether there was any wire inside. He also testified that *so far as he could see* [libelant's italics] the guard and the tube were intact (II, pp. 731-733). It is upon these last bits of evidence, and these alone, that counsel bases his claim that the damage was done on the way to Yokohama, and hence the Dredge was free from responsibility. This claim, in our opinion, is unsound, rests on absolutely impossible assumptions, and leads to conclusions improbable, if not contrary to intelligent speculation."

Again (p. 117):

> "The claimant produced no evidence on the point for which it contended, but set up as against the foregoing salient facts:
>
> "That Lyle, who did not see the guard at all, testified that, *so far as he could see* [libelant's italics] the guard and the shaft were intact, and that he could not get his fingers underneath the guard. In other words, libelant produced facts against negative possibilities, and we submit that a fair exercise of judicial consideration can lead to but one conclusion under those circumstances. If the Dredge's wire fouled the Siberia is the Dredge to escape on the pure conjecture, indulged in despite established facts and common intelligence, that the wire through some unimaginable hocus pocus got underneath the guard on the voyage to Yokohama?"

Is that a fair statement of the evidence, or of the situation? The very italics above referred to, "*so far as he could see*", discloses the unfairness of the argument. Mr. Lyle's testimony is not fairly open to that construc-

tion. In the first place, it is said he "never saw the shaft at all". Of course he never saw the shaft at all, because that was entirely enclosed in the propeller tube, which covered the shaft and the hub of the propeller to within an eighth of an inch (p. 733):

> "Q. You could not see where it would hurt the vessel at all, was it in contact with the shaft or was it on the outer tube?
> A. I could not see the shaft at all. I never seen the shaft.
> Q. Did the propeller tube run down, as I understand you, to the guard within an eighth of an inch?
> A. Just so I could get my fingers underneath between the covering immediately under the hub—*it almost touched the hub.*
> Q. *And underneath that cover inside is the shaft?*
> A. *The shaft is inside.*"

Then follows the testimony upon which libelant has laid stress by his italics. He says "*he also testified that "so far as he could see the guard and tube were in-"tact*".

Let us see what the nature of Lyle's knowledge was upon which this testimony of the condition of the tube and guard rests (p. 733):

> "Q. And this tube and guard down to the hub were intact?
> A. So far as I could see.
> Q. The wire was around this outer shaft?
> A. Around the outer shaft."
>
> "Cross-Examination.
>
> Mr. McClanahan. Q. Counsel brought you to the point where the guard and the shaft extended to a short distance from the hub, and you said that underneath there was the shaft itself?
> A. In underneath, yes.

Q. Do we understand you to say that there was a wire underneath there?

A. I could not find any there; I didn't see any."

* * * * * * *

"Q. Would you want to swear that there were no coils underneath in the cavity formed by the guard?

A. I will swear I didn't see *or feel* any there. I could not tell there was any.

Q. You could not feel any there? Could you get your fingers in?

A. No."

"Redirect Examination.

Mr. Frank. Q. Now the way that was there, the tube coming down within an eighth of an inch, if there had been any wire there you would have known it?

A. I was working on top of the propeller; I had no staging and as far as I could feel around there was no wire in there. *I could just get my fingers on the edge.*

Q. *And all around where you got your fingers no wire had gotten in?*

A. *No.*"

How can any fair and honest consideration of this testimony lead to any conclusion other than that the guard was intact and the wire had not gone underneath? In fact, it would have been impossible for a wire of that size to have passed underneath without destroying the guard, and it would have been equally impossible for that condition to have existed and remain undiscovered by Lyle, sitting on the propeller tube and feeling around it. So, too, if the wire had gone in, there must have been a point where its connection with the outer wire is established. At that point no less than two of those large wires must have lain across the entrance.

We think with this testimony we start with as safe a premise that at that time the guard was intact and no wire underneath, as can well be made by human testimony, and *libelant's* "pure conjecture indulged in de-" spite established facts and common intelligence", is the only foundation for *his* contention that the damage *had already* occurred, instead of being the foundation of *our* contention that the damage *occurred on the voyage.*

Alleged facts 2 and 3.—Great stress is laid by appellee upon the testimony of Hamilton to the effect that the starboard propeller slowed down immediately on taking up the wire, and made one revolution less throughout the entire voyage. This is urged as proof that the wire must have gone underneath the guard and rested on the shaft immediately upon the occurrence of the accident.

It is said (Brief, p. 115):

> "Furthermore, the slowing down of the starboard engine when the wire was first picked up shows that the strain was on the shaft itself at the time (Hamilton, I, 209), for had the wire been simply on the guard *there would have been no* strain on the shaft and consequently *no slowing down of the engine.* And again, how can it be accounted for that the starboard engine *throughout the entire voyage to Yokohama* made one revolution less than the port, except for the reason that the wire was tightly wrapped around the shaft itself and remained unchanged in its position there throughout the trip?"

This same argument is repeated several times and urged as "facts" 2 and 3 of his summing up.

However, if those be the facts, *they are conclusive evidence not only of the negligence of the ship in pro-*

ceeding upon her voyage, but also conclusive evidence that the bulk of the damage occurred upon such voyage. If the engine slowed down immediately, and Hamilton knew it, he was warned thereby against going forward. If when she started on her voyage, and after the buoy was removed, she still continued slow, he must have known that the original cause remained and the vessel should not have proceeded further. It also proves that the damage must have been done upon the voyage, because, when the wire was first picked up, not exceeding 20 revolutions of the wheel (if so many) were taken *before the engine was stopped, and not started up again until the voyage to Yokohama was begun. As 20 revolutions are to 20,000 revolutions* (the ordinary speed would be about 80 to 90 revolutions an hour—p. 266,—and the time about two weeks), *so is the damage done at the outstart to the damage done upon that voyage.* Or, if we take the time into consideration, we have revolutions for two minutes (p. 207) when the wire was first picked up, against over 20,000 minutes (two weeks) on the voyage. Will anyone say that, with the cause the same, the damage in the one instance can bear any reasonable proportion to the damage in the other? That the cause is the same, libelant admits, for he says:

> "How can it [the slowing of the engine] be accounted for * * * except for the reason that the wire was tightly wrapped around the shaft itself and remained unchanged in its position there throughout the trip."

So, also, with these two alleged facts before us, what shall we say of the judgment of Hamilton, as a marine engineer, which is the foundation of appellee's argu-

ment (Brief, p. 88), that it was proper to proceed, under the circumstances, from Honolulu to Yokohama? Are they not such "facts" as prove his negligence within the meaning of the case of Oceanic, Etc. v. Aitken hereinbefore referred to?

Alleged "facts" 1 and 5.—Another fact urged by appellant is (p. 16):

> "(1). There was a great strain at that time on the guard and none at any other."
>
> "(5). For the guard to have been bent on the voyage some exterior force or strain must have been applied from the exterior, and none is shown, or even suggested."

This line of argument recalls another situation which only serves to emphasize the negligence of the steamer in failing in the first instance to go alongside of the wharf and there finally relieve herself of the buoy and all of the wire.

The amount of the initial strain can easily be judged from the worn out link of the buoy chain at the place where it parted, a link almost gone by rust and friction.

In addition to this, the forward motion of the vessel was a horizontal strain along the line of the propeller tube, and not a vertical strain at right angles thereto. This horizontal strain would not have the tendency to crush in the tube, or any part of it, but would be distributed over its entire surface. While on the other hand, a vertical strain would bring the pressure directly against the underneath part thereof, and relieve the pressure on the top, thus concentrating the pressure on a single point.

Now, after Lyle had made his examination, what did those on board the ship proceed to do? Being in the open water, where they could not build staging, as they would have done alongside the wharf, and *being in haste,* they adopted a crude and dangerous means in their attempt to part the wire. Speaking of the diver, Hamilton says (p. 211):

> "I asked him what he was going to do, and he said he was going to clear the chain. * * *"
>
> "The WITNESS. He went down and he was working a hack saw; you could hear him quite plainly on the surface sawing something. He came up several times and we tried to break it; he told us it was a wire cable, and *we tried to break it with the strain from the capstan.*"

Again:

* * * * * * *

> "And every time he came up we would try again to part it.
>
> Q. How did you try?
>
> A. By taking a strain from the capstan. We had a five inch line roved into a ring bolt on the buoy, and we took a strain on the buoy; *we broke a 5 inch line 3 or 4 times. Then we put out a heavier line* and he sawed it almost two thirds through when we parted it."

We suggest to the Court a comparison of this vertical strain from the capstan which parted a five inch line three or four times, with the horizontal strain necessary to part the worn out link of the buoy chain, and ask which is the more likely to have crushed in the guard? If it was the latter, it was unquestionably an act of gross negligence, for no such proceeding would have been necessary had the vessel *taken the time* necessary

to unreave the cable without injury, which Dr. Phillmore, in the case hereinbefore referred to, says *she was bound to do,* and which the Court in STEVENS, ETC. v. WESTERN UNION TEL. CO. agrees she was bound to do, instead of adopting this hasty and heroic mode of parting the cable. If the diver could saw the cable three-fourths through, he could saw it entirely through, and the time for so doing should have been allowed him.

But this is not all. While under the law we do not feel bound to demonstrate how this damage occurred, but on the contrary, as we have already indicated, contend that the burden of such proof lies upon the libelant, it is not an improbable suggestion that we make, based upon the ravelled condition of the wire produced in evidence and the rapid revolutions of the propeller,—80 to 90 turns a minute,—that, in the early part of the voyage, one of these ends of the wire was caught in the axis of the propeller and there drawn so tight as to crush the guard. This would also seem to be justified by the condition of the nuts.

Alleged facts 4 and 6, namely that the propellers were moving astern at the time of the initial strain, and that the respective positions of the two cut pieces of the wire and the clamp and the shackle were the same at both Honolulu and Yokohama, do not appeal to us, because the wire was *not* evenly wrapped around the tube like the thread on a spool, but would naturally cross and overlap so as to bind it and hold it in position. Had that not been the case, Lyle would have had no difficulty in unwrapping it after he had loosened the buoy.

Under those conditions, no legitimate inferences can be drawn from the reverse motion of the propeller on the voyage, or the unchanged situation of the ends of the wire at the end of the buoy.

Damage to the propeller blades.—This matter is taken up by libelant on pages 117 to 121 of his brief, and his contentions there are based on guesses of witnesses who had no facts upon which to base their inferences. They were making guesses pure and simple, and when they made them, they forgot, as well as counsel in his argument forgets, that all the damage to the blades was on the *leading edges,* while the propeller was *backing* at the time it picked up the wire. Hence the "strong force" that would "knock out" the edges of the blade, was applied on the *wrong side* of the blade, to do this particular damage.

So, too, it is overlooked that the damage is confined to 18 inches from the hub. How could it have been so confined, in the initial act of picking up the wire? On the voyage, however, 18 inches is just about the reach of the protruding wires.

Again: The nuts were "worn", not chipped or broken, and even Stewart, testifying for libelant, admits that that kind of action requires long and continuous friction. And independent of that testimony, we ask which contact is the more likely to produce that effect,—the two minutes of the initial strain, or the 20,000 minutes continuous revolution on the voyage to Yokohama?

The docking of the vessel.—The contention that the docking of the vessel was rendered necessary by the

mere fact of the fouling of the wire, is not a legitimate result of the evidence. It is a "built up" case by the experts.

Evers is certainly not entitled to credit. We have already referred to his anxiety for the libelant, as shown by his bald statement that the propeller blades were good for scrap alone, and no one would ever put them on the vessel again, whereas, in fact, they were not damaged as he testifies, and were dressed down and returned to the ship, unquestionably with his concurrence.

That the dropping of the shaft, and not the initial strain, was the reason for the docking, is made clear by the evidence, and the dropping of the shaft admittedly can only be the result of long and continuous friction (Stewart, pp. 394-97).

With these suggestions, we are content to submit the question of damages, and respectfully urge that under the law as established by this Court, there is no evidence that will justify the award made in this case.

INCREASING DAMAGES.

A suggestion is made that the damages be increased in favor of the appellee, notwithstanding the appellee has made no appeal.

We are aware that this Court has previously exercised jurisdiction for such a purpose, and in the case of The San Rafael, 141 Fed. 275, has laid down the rule that it is unimportant that no appeal is taken by

the appellee, but the whole case is opened by an appeal as much as it would have been if both parties had appealed.

In the case of California Nav. & Imp. Co. v. Union Trans. Co., 176 Fed. 534, where a similar question was raised, this Court said:

> "The appellant does not now dispute the correctness of that part of the District Court's decisions which fixed the responsibility for the collision upon the officers and crew of the 'Mary Garratt', and the appeal brings to this Court for decision *only* the question as to the amount of damages which the owner of the 'Dauntless' is lawfully entitled to recover."

In that case the finding of the lower Court limiting the liability was distinctly raised by the appellee, though no appeal was taken. This did not seem to us to be in accord with the ruling In re San Rafael, which we then urged upon the Court's attention.

Neither are the decisions of the other circuits in accord upon this subject, but it would seem that the weight of authority is against such an allowance.

The question whether an appeal in admiralty is a new trial to such an extent that an appellee without appealing may claim that the decree was erroneous, is one of which the Circuit Court of Appeals for the Second Circuit in the case of Munson Steamship Line v. Steamship Miramar Co., Ltd., 1909, 167 F. R. 960, 961, said:

> "A very interesting and difficult question is to be determined upon which the decisions even of the same courts are not harmonious."

The Court in that case, based its conclusion on the interpretation that it placed on IRVINE v. HESPER, 122 U. S. 256; and after reviewing legislation by Congress with respect to the Courts added:

> "On the other hand it has been held in many cases that one who has not appealed can be heard only in support of the decree, and therefore can get in the Appellate Court no more or other relief than it gives. CANTER v. AMERICAN INSURANCE Co., 3 Pet., 307; STRATTON v. JARVIS, 8 Pet., 4; AIREY v. MERRILL, 2 Curtis, 8; THE PEYTONA, 2 Curtis, 21; ALLEN v. HITCH, 2 Curtis, 147; THE ALONZO, 2 Clifford, 548; THE ROARER, 1 Blatch., 1; THE WILLIAM BAGALAY, 5 Wall., 377, 412; THE QUICKSTEP, 9 Wall., 665, 672; THE MARIA MARTIN, 12 Wall., 31; THE MABEY, 13 Wall., 738; THE STEPHEN MORGAN, 94 U. S. 599; SHAW v. FOLSOM, 40 F. R. 509; THE W. F. VOSBURG, 50 F. R., 239; THE ATLANTIS, 119 F. R., 568; LEARY v. TALBOT, 151 F. R. 355; VACAREZZO v. 567,000 GALLONS OF OIL, 161 F. R., 543."

In addition to those cases, the following should be noted: THE MERRIMAC, 1871, 14 Wall. 199; THE MABEY AND COOPER, 1871, 14 Wall. 214; THE D. L. MARTIN, 1875, 91 U. S. 365; UNITED STATES v. BLACKFEATHER, 1894, 155 U. S. 180, 186; CHEROKEE NATION v. BLACKFEATHER, 1894, 155 U. S. 218, 221; THE J. J. MCCARTHY, 1894, 61 Fed. R. 516; THE INDRANI, 1900, 101 Fed. R. 596.

The attention of the Court is also asked particularly to the language of Mr. Justice Brewer, sitting as Circuit Judge, in PIONEER FUEL COMPANY v. MCBRIER, 1897, 84 Fed. Rep. 495. In that case the District Court had awarded the libelant an amount on account of demurrage. The respondents appealed. In discussing the

question whether or not the findings of fact of the Court below were before the Court of Appeals for consideration, Mr. Justice Brewer said, p. 497:

> "It must be remembered, also, in this connection, that the Court of Appeals stands at least, not in the old relation of the circuit to the district courts, but rather in that of the Supreme to the Circuit Courts, and any case brought to this court from either the circuit or district court comes here for review, rather than for trial, and whatever limitations or qualifications may be applicable to admiralty cases do not abridge the important facts that this is a reviewing and appellate tribunal. THE MABEY, 10 Wall., 419. * * *"

(p. 500): "It is claimed by the libelants that the amount of demurrage allowed was not sufficient, and they insist that, although they took no appeal from the decree, the appeal on the part of the claimant brings the whole case into this court for a rehearing, and upon the facts as presented this court is at liberty to increase the amount of the award—citing IRVINE v. THE HESPER, 122 U. S., 256, 7 Sup. Ct., 1177, in which it was held by the supreme court that such was the rule on an appeal from the district to the circuit court. But the appeal from the district to the circuit court simply transferred the case from one to another for trial, and it may be questioned whether that rule applies in a case brought to an appellate court for review. * * * Upon a careful examination of the testimony, we are not satisfied that we should be justified, even if we had the authority, in disturbing the conclusions reached by the trial court."

In the ATLANTIS, 119 Fed. Rep. 568, a collision case between the steamers JOHN OWEN and the ATLANTIS, Judge Day, now Mr. Justice Day, speaking for the Court of Appeals for the Sixth Circuit, said (p. 569):

> "The learned Judge who tried the case in the District Court found both vessels at fault and divided the damages. From this decree, the OWEN did not take an appeal; and we may regard her fault as established and need not consider that question any further than it enters into the discussion of the alleged fault of the ATLANTIS. * * *"
>
> (P. 572). "In this case, the fault of the OWEN is established by failure to appeal."

The language of Mr. Justice Harlan, sitting in the Court of Appeals for the 7th Circuit, in GILCHRIST v. CHICAGO INSURANCE Co., 1899, 104 Fed. Rep. 566, gives a contrary view of the right of a party who has not appealed.

It may be that, in view of the foregoing considerations, this Court might reconsider its former ruling, should it get so far, in the present case, as to require an application of the rule.

INTEREST.

We had not noticed that interest was charged at *8%* from March 12, 1906, to the date of the decree, and therefore did not refer to it in our opening brief nor in our oral argument. It does not appear in the opinion, but only in the decree. When at the oral argument counsel spoke of interest, generally, and asked us if we made any question on that subject, we did not know what he had in mind but advised him that if we had any rights in that connection we would insist upon them. He made no further reference to it, and now suggests our failure to argue it as a reason for refraining from giving his views in his brief. We now repeat what we said at the hearing, that we did not waive this error

which is pointed out by the 32nd assignment, drawn by the Honolulu counsel. While we understand that the allowance of interest at all is in the discretion of the Court, the rate of interest when allowed, is to all intents and purposes fixed by maritime courts at 6%. There may, perhaps, be cases where, upon contract, a local rate of interest would be just, but that does not apply to tort. Neither is there any reason under the circumstances of this case why, in any event, the local rate at Honolulu (if 8% be the local rate) should be adopted, for none of the repairs were made there, and none of the expenses, except $40 for the diver, incurred there, nor are either of the parties, in the true sense of the word, resident there. The cause was tried there because of the mere accident of jurisdiction due to the temporary presence of the dredge in that harbor. Ordinarily 8% would be regarded as a very hard, and even usurious, rate of interest, and we can see no reason, in justice, why it should be awarded in this case for any period of time.

We respectfully suggest, that for such damages, if any, as this Court may award, the rate be reduced to 6%.

II.

Did the Steamer Pick up the Wire of the Dredge?

This subject has had ample attention in our opening brief and does not require rediscussion. We shall, therefore, make but a few further suggestions.

The rule that the Court will not reverse upon disputed questions of fact unless clearly against the evidence.—This rule is urged upon the Court as a reason why, in the present case, it should not review the question of liability, and it is suggested that "almost all the material "evidence on disputed questions, save that of Spencer "and Matson for the claimant, and Nelson for the libel-"ant, was heard by the Court personally." To this statement we take serious exception. On the contrary, we assert the more important witnesses were examined entirely by deposition. The following list, which comprises more than half of the record before the Court, will speak for itself:

Erickson—The deck-hand on the Dredge,
Hamilton—The engineer of the "Siberia",
Slatterly—U. S. Engineer in charge of improvements in Honolulu Harbor,
Watson—Surveyor in San Francisco,
Evers—Surveyor in San Francisco,
Stewart—Surveyor in San Francisco,
Wallach—Assistant Treasurer of the Pacific Mail,
Railton—Auditor of the Pacific Mail,
Nelson—Deck Captain of the Dredge,
Schwerin—Manager of the Pacific Mail,
Beaton—Superintendent of San Francisco Dry Dock,
Hubacher—Engineer of San Francisco Dry Dock,
Gardner—Engineer of the Union Iron Works of San Francisco,

all called on behalf of the libelant. Then

Spencer and

Matson,

called on behalf of the claimant,—comprising 537 pages out of the 994 pages preceding the opinion in this case.

Nor is the testimony of those witnesses confined to the question of damages. Many of them testified directly upon the question of initial liability, and others, called ostensibly upon the question of damages, have given evidence which is relied upon by libelant as expert evidence to prove the cause of the damage.

It is further said:

> "It is also true that the credibility of Spencer's evidence is a vital issue in the case, and that Spencer is examined on a deposition de bene esse. It should be remembered, however, that the witnesses who contradict Spencer were examined in Court, and that the trial judge had ample opportunity of determining *their* means of knowledge, standing and reliability."

To our mind, this should be an argument in favor of rather than against this Court reviewing that testimony, for upon the face of it, it implies a bias in favor of libelant's witnesses who were before the Court as against Spencer and Matson, who were being judged upon the record that, lacking their personality, to that extent does not give true expression to their testimony. In this respect the appellate Court sits in a fairer position, for it can judge the testimony of both classes of witnesses without being influenced by the disadvantage pointed out in the foregoing considerations.

So, too, as pointed out in our original brief, even after eliminating the testimony of Spencer, the conclusion of the Court rests entirely upon inferences, the correctness of which we combat, and not upon direct testimony. The ground for those inferences are as much first-hand with this Court as with the District Court, and there is nothing in the rule appealed to that would disqualify this Court from drawing as unerring an inference as the Court below.

So far as relates to the "conditions in Honolulu harbor", there is nothing affecting this case that does not distinctly appear upon the maps. If that be not true, and the trial Court departed therefrom and indulged in a judicial knowledge of which we are not advised, it is error, just as much as it would be error for a juror to recur to his own knowledge of a fact not in evidence.

Animadversions upon claimant's conduct.—By degrees we are being taught to recognize what we regard as a new development in the art of advocacy, for every act or expression upon our part is given a sinister cast, and every presumption of unfairness upon our part is indulged to the fullest extent. The ordinary business necessities of the claimant, carrying on large dredging operations all over the United States, is made the foundation for the suggestion of a removal of witnesses from Honolulu for the suppression or manufacturing of testimony. The perspective of counsel is distorted. Because this single case was at the time the sole business of his life, he thinks it must have been so with the claimant; whereas it was to the latter but an incident com-

pared with the large and important operations then engaging its attention. Its men are continually being transferred from point to point as business exigencies require. They, too, like sailors, are nomadic by nature, and no more easily kept track of.

The injustice of this comment, which runs by innuendo and suggestion throughout the entire argument, is exemplified in the following:

> "It may also be fairly assumed because of the relationship existing between Nelson and the claimant, that the latter knew long before filing its original answer (March 31, 1906) that this employee knew that a wire had been fixed on Buoy No. 2, and it is a *coincidence worth noting that Nelson's employment on the Dredge 'Pacific' in Honolulu harbor terminated* in the receipt by him of a letter from claimant's superintendent, requiring him to report at San Francisco for work *at or about the same time that Spencer, the Dredge mate, proceeded to San Francisco* and secured employment from it" (p. 17).

Now it appears that Nelson *left the employment* of the claimant *in Honolulu,* and *remained in Honolulu until April 6th or 7th* (pp. 352-353), (which, by the way, was a month after the filing of the original answer); that his first interview with counsel *in San Francisco* was *after the fire* (p. 370); that during *three months after the accident he was in Honolulu, out of the employ of the claimant, during which time he had frequent conferences with counsel for the libelant,* who examined him and took down his statements respecting this accident, and when he was about to leave for San Francisco he notified said counsel (p. 373). At that time counsel did not

indicate that he desired Nelson's testimony. Subsequently libelant desiring it, and its counsel being in San Francisco and Nelson being in San Diego *in the employ of the claimant, he was ordered by the claimant from his work,* to proceed to San Francisco to report to *counsel for libelant to make* such use of him as he saw fit (pp. 371-72).

In the face of those facts, what shall we think of the suggestion of unfairness contained in the foregoing excerpt?

Likewise with the witness Erickson, who, it is said, "was promoted from deck hand to mate before he left "the employ of the Pacific" (p. 18),—unquestionably a suggestion that the claimant by this means intended to bribe the witness. Yet Erickson is called on behalf of the libelant (p. 154), and there is no suggestion that his testimony was not satisfactory to the libelant.

To our mind this method of suggestion is a confession of weakness.

So far as the animadversions relate to the conduct of counsel, we do not feel called upon to defend ourselves before this Court.

We do not think it necessary to make an extended reply to libelant's argument on the question of liability, having treated it, as we think, in a satisfactory manner in our opening brief, and, as we there suggested, we rely upon an independent and dispassionate examination and scrutiny of the testimony by this Court, feeling satisfied

that the decision, whether for or against us, will be founded upon considerations of reason and justice, and will not be influenced by matters of the nature above referred.

There is a single proposition, however, that appears to us to be new in this argument, to which we desire to call attention, and that is, the quotation from Nelson's testimony and from the claimant's answer, found on page 16 of the brief, and repeated on pages 39 and 40, to prove that: "After the use of this wire to Buoy No. "2 it was disconnected *at the first pennant from the "buoy"*. (The italics are libelant's.) The testimony quoted does not warrant the suggestion. It is embodied in a question, to which a direct answer is made,—"Yes, sir." Having framed the question ourselves, we may be credited with a fair knowledge of what was intended, and the only room for speculation lies in the fact as to whether or not the witness understood the question as the questioner understood it. If so, the interpretation given to the testimony is decidedly wrong. The questioner had in mind that the disconnection was made at the *first pennant from the dredge,* and *not* the *first pennant from the buoy.* The same may be said concerning the amended answer. The construction placed by the libelant upon the language in both instances, never for one moment occurred to us. There is nothing in the question to suggest that either party regarded the *"portion"* next to the buoy as the shorter of the two portions so separated. Nelson's testimony was taken in December, 1906. We then knew, as pointed out in our

opening brief (p. 29), that the method of disconnecting a wire was to "retain the end connected with the dredge; " that is *only 50 or 100 feet long outside the cut line*". Nelson knew that also, and while he did not know how much was left on the buoy, it cannot, in view of that knowledge, in justice be said that he did not understand the question as the examiner understood it.

Respectfully submitted,

NATHAN H. FRANK,
IRVING H. FRANK,
Proctors for Appellant.

No. 1866

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

THE NORTH AMERICAN DREDGING COMPANY (a corporation), claimant of the Steam Dredge "Pacific", her engines, machinery, boilers, etc. (libelee),

Appellant,

vs.

THE PACIFIC MAIL STEAMSHIP COMPANY (a corporation) (libelant),

Appellee.

Supplemental Brief for Appellee.

E. B. McCLANAHAN,
S. H. DERBY,
Proctors for Appellee.

Filed this.....day of November, 1910.

FRANK D. MONCKTON, Clerk.

By.....Deputy Clerk.

PERNAU PUBLISHING CO.

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THE PACIFIC MAIL STEAMSHIP COMPANY (a corporation) (libelant),

Appellee.

Supplemental Brief for Appellee.

INTEREST.

Neither in opening brief nor oral argument did counsel raise this question, and while this silence may not have amounted to a waiver, still now that the matter is brought up in a reply brief (p. 27), we feel it necessary to discuss the subject as it had been our purpose to do had a point been made of it before.

Counsel, while admitting that the allowance of interest is in the discretion of the court, says that the rate

when allowed is fixed by maritime courts at 6 per cent. This statement as applied to the rate allowed on admiralty *decrees* is probably correct, but the question here is an entirely different one involving the allowance of interest on the amount of the damages found and not on the final decree.

Although libelant's expenditures were made prior to the date of filing its amended libel, the court arbitrarily fixes the latter as the due date of the damages, and has added a further amount which it has seen fit to call interest.

In affirming a similar award of interest, made by a commissioner, it has been said:

> "It is not strictly interest—which is due only for the withholding of a debt—but the compensation for the permanent injury to the vessel was due as of the time when it was inflicted, and the addition of what is called interest is justly added for withholding it * * *. It has been held in one or more instances that where a jury renders a verdict for the amount of damages resulting from an injury, and adds interest from the date of its infliction, the verdict should be set aside; but it is quite well settled that in ascertaining the amount of compensation to be paid, it is justifiable to find the extent of the injury, valued in money, and add a sum equal to interest to make compensation at the time of such finding."
>
> *The Illinois*, 84 Fed. Rep. 697; 698.

In the case of *The Natchez* (78 Fed. Rep. 183), the Circuit Court of Appeals for the Fifth Circuit, at page 185, says:

"It has been held by this court in Railroad Co. v. Schneider, 13 U. S. App. 655, 8 C. C. A. 571, and 60 Fed. 210, that a verdict assessing unliquidated damages and allowing interest from judicial demand is sufficiently specific where it appears clear such interest is allowed as part of the damages. The damages allowed in this case are, in the main, liquidated damages, to wit, specific sums of money actually paid for materials and repairs prior to the filing of the libel, and only one item in the account allowed can be classed as unliquidated and that is for detention or demurrage of the steamboat Arkansas City for two days, the allowance of which is made the ground of the sixth and last assignment of error. The claim in the libel is for three days detention on the up trip $263 per day. This damage was specifically and sufficiently proved, and from the view the district court evidently took of the case was properly allowed, and interest thereon is in the nature of, and was intended as, damages."

In the case of *The Rickmers* (142 Fed. Rep. 305), this court, at page 314 of the decision by Judge Morrow, after stating the well-known principle that in cases of this character the giving of interest is discretionary with the court, says:

"The allowance of interest was, therefore, under all the circumstances, *an element of compensation,* and not punitive damages, and was properly allowed upon the amount expended for the repairs of the vessel * * *."

In a case decided in 1874, the circuit judge says:

"Where the value of the thing lost, or the cost of repairs and the like, are the test or measure of recovery, and the amount of damages becomes mere matter of computation, *interest* is as necessary to *indemnity* as the allowance of the principal sums.

> But if the allowance of interest rests in discretion, still the indemnity of the party for injury from a collision occurring through the fault of another vessel, should be the object of the court in the allowance of damages."
>
> *The America,* Fed. Case No. 285.

See also:

The Bulgaria, 83 Fed. Rep. 312;
Harrison v. Hughes et al., 119 Fed. Rep. 997, 999;
Brent v. Thornton, 106 Fed. Rep. 35, 38.

This discretionary "element of compensation" allowed in collision cases is not by any rule or custom known to us limited to any rate; it might be properly fixed at 5 per cent or 10 per cent or what not,—its propriety, when exercised, is reviewable only for an abuse of discretion. The rate is as much and as purely a matter of discretion as the allowance itself, and that the trial court in the case at bar fully appreciated this is shown by its distinguishment between one rate (8%) given as part of the damages and another rate (6%) as the customary rate when interest is allowed on decrees.

The propriety of this interest allowance was duly argued in the lower court and may be said to have received that court's full consideration viewed in its legal aspect (see record, III-1043).

In its determination of the 8 per cent rate as an element of compensation, there are many matters which might and probably did influence the trial court. Let us attempt an enumeration of some of them:

1. Its view that the award covered in the main actual outlays of money made in Japan, Hawaii and California. (Under all ordinary circumstances, libelant should have been reimbursed for the loss of the use of its moneys spent in these outlays from the date they were incurred; instead the lower court allowed this "element of compensation" only from the date of the filing of the amended libel, March 12, 1906. The difference here alone would probably go far towards making up the difference between 6 per cent and 8 per cent.)

2. The court may have taken into consideration the trouble and expense thrown upon the libelant through the wrong of the claimant which cannot be reimbursed as costs in this action, and yet, as a matter of *indemnity,* libelant would seem to be entitled to recover therefor.

3. It may have taken into account the fact that injuries had been received which were incapable of full and complete renewal, and which were, therefore, in the nature of permanent injuries. Such, for instance, as the grooving of the brass liner, the indentations of the propeller blades. In both of these, though they may have been seemingly as good as before, as matter of fact they were not, in their money value, what they had been before the claimant's wrong had been inflicted.

4. It may have taken into account the irrecoverable loss in costs and expenses sustained by libelant in contesting the suit brought by Lyle, the diver, to recover his charge of $1,000,—a suit tried by the court and decided by an award against the Pacific Mail Steamship Co. for $1,000 and costs.

5. It may have taken into account the fact that libelant was prevented the use and possession of its vessel for seven days while in dry-dock and was recovering demurrage for but four of these.

Surely, when these matters are considered, it cannot be said that the trial court abused its discretion in awarding, as an element of compensation, 8 per cent instead of 6 per cent as a part of the loss sustained through the claimant's wrong.

INCREASING DAMAGES.

Counsel's argument and authorities cited under this head seem to be a verbatim re-statement of the same contention made in a petition for certiorari in *Mowinckel v. Dewar et al.* (179 Fed. Rep. 355), which was denied. In view of this court's decided opinion on this subject we do not deem it necessary or appropriate to answer the present argument.

PROCEEDING UPON THE VOYAGE TO YOKOHAMA.

Under this head of the reply brief we are advised that the master the "Siberia" committed suicide at Hong Kong (p. 8). We would be greatly interested to know to what part of the record counsel points the court in verification of this statement. The only evidence on the subject is given by chief engineer Hamiliton and is as follows:

"Q. Where is the captain of the 'Siberia', the man who was captain of her in November, 1905?
A. Dead.
Q. When did he die?
A. On the 6th or 7th of December.
Q. Whereabouts?
A. In Hong Kong.
Q. What was his name?
A. John Clement Smith" (I-227).

Dated, San Francisco,
November 22, 1910.

Respectfully submitted,

E. B. McClanahan,
S. H. Derby,
Proctors for Appellee.

No. 1866

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

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Appellant,

vs.

THE PACIFIC MAIL STEAMSHIP COMPANY (a corporation) (libelant),

Appellee.

Appellee's Petition for a Rehearing.

E. B. McCLANAHAN,
S. H. DERBY,
Proctors for Appellee and Petitioner.

Filed this.....day of April, 1911.

FRANK D. MONCKTON, Clerk.

By.....Deputy Clerk.

PERNAU PUBLISHING CO.

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Appellant,

vs.

THE PACIFIC MAIL STEAMSHIP COMPANY (a corporation) (libelant),

Appellee.

Appellee's Petition for a Rehearing.

To the Honorable Judges of the United States Circuit Court of Appeals for the Ninth Circuit:

The Pacific Mail Steamship Company, appellee herein, respectfully petitions for a rehearing of the above cause upon the following grounds:

1. That the court, in reducing the damages awarded from $20,859.75 to $3,580, apparently failed to consider the item of $15,932.60 for drydocking the "Siberia" and the fact that, according to the

uncontradicted evidence, such drydocking was made necessary by what took place at the time the wire cable of the appellant was picked up, irrespective of the subsequent action of the captain of the "Siberia".

2. That the court apparently failed to give due consideration to the authorities cited by appellee and to the uncontradicted evidence in the case in deciding that it was inexcusable error on the part of the captain to proceed outside the harbor of Honolulu and then to Yokohama.

We recognize in presenting this petition that the case was fully and elaborately argued in the briefs of counsel and we shall, therefore, present these grounds as concisely as possible.

Argument.

First Ground.

In its statement of facts the court says:

> "It was found that fragments of wire had been forced into the shaft bearings doing injury which necessitated removal of the propeller and withdrawal of the shaft and replacing part of the bearings with new material. The edges of the propeller blades were notched and the nuts securing them to the hub were injured. The total amount claimed by the libelant as damages including demurrage for detention of the ship and expenditures for repairs, work done by the divers at Honolulu and Yokohama, and an alleged marine survey at

San Francisco, approximate $25,000." (Opinion, pp. 2-3.)

And in the decision itself it is said:

> "The only evidence on the subject proves that, before proceeding, one of the blades on examination by the diver was found to be uninjured but after the voyage to Yokohama the edges of all of the blades were found to be indented by scraping or grinding upon some hard substance, which can be accounted for only upon the theory that the vibrating ends of the cable caused that injury. It is not proved that any fragments of wire were forced into the shaft bearings before the cable had been cut. The evidence does not prove when or how the nuts which united the blades to the propeller hub, were damaged. The Pacific is liable for the necessary expenses of removing the cable and chain from the propeller, for incidental expenses, including the hire of the tug for additional services, and for demurrage for the time which the Siberia would have been delayed at Honolulu. All of the other expenditures and losses are, according to a preponderance of the evidence, attributable to the errors of the captain of the Siberia above specified." (Opinion, p. 9.)

It is thus found by the court that the dredge "Pacific" cannot be held liable for the injuries mentioned by the court. But nowhere in the opinion is the expenditure for drydocking the vessel, the main item of damage in the case, specifically mentioned and, although it is said in the statement of facts that the forcing of "fragments of wire" into the shaft bearings was what necessitated the withdrawal

of the shaft, the evidence in the case is directly to the contrary. Our point is that *the original accident in Honolulu* was, *according to the uncontradicted evidence,* the thing that made necessary the drydocking of the vessel and the withdrawal of the shaft; and that the court has fallen into error in saying that "All of the other expenditures and "losses are, *according to a preponderance of the* "*evidence,* attributable to the errors of the captain "of the Siberia above specified". And we believe that the court has confused the comparatively minor injury to the shaft caused by fragments of wire getting into the shaft bearings with the initial strain on the shaft which, *of and by itself,* necessitated the drydocking of the vessel and the withdrawal of the shaft. This court has found that "it "is not proved that any fragments of wire were "forced into the shaft bearings before the cable "had been cut", but it does not find and, under the evidence, we contend that it *could not* find that the wire was not wrapped around the shaft at the time the cable was picked up (appellee's brief, pp. 113-117). And the evidence conclusively establishes that the "Siberia" would have had to have been placed in the drydock and her shaft would have had to have been withdrawn because of what happened in the harbor of Honolulu and *even if the wire had been removed there.* On this point Mr. Evers, one of the marine surveyors in San Francisco, testified as follows:

"Q. Suppose that the ship had removed from her shaft the wire in Honolulu, and that had been the report made to you, would you still have ordered the ship docked?

A. Yes, sir, by all means.

Q. Why?

A. Because it had an unusual strain on it. It slowed the engine down. The divers had reported that the blades were all chafed, and we would want to see it so as to approve it.

Q. You could replace the chafed blades without docking the ship?

A. But we could not see the shaft.

Q. What was the necessity of seeing the shaft from what you learned at the time that you ordered the vessel docked?

A. Because it slowed his engine right down with full steam on, and wound the buoy and wire right up under his counter.

Q. Why did you deem it necessary to see the shaft, having those facts?

A. Because we wanted to see if it was in any way strained, or the liners were loose.

Q. Is that always necessary?

A. It is always necessary.

Q. Did then the fact of the ship proceeding with the wire around the shaft from Honolulu to Yokohama enter into your determination to dock the ship?

A. No, sir, it was the whole accident in Honolulu that determined us.

Q. Irrespective of the fact that she proceeded with the wire around her shaft from Honolulu to Yokohama?

A. Yes, sir." (I-327, 328.)

The evidence of Messrs. Watson and Stewart, the other marine surveyors, is to substantially the same effect (Watson, 293; Stewart, 387). The report of

survey made in San Francisco may be, as the court says, "utterly worthless", but can the express testimony of these three surveyors that the ship would have had to have been docked anyway, irrespective of the captain's negligent acts, be so disregarded? And can it fairly or justly be said, in view of the evidence of these surveyors and in view of the fact that appellant put in not one word of evidence on this subject, that the drydocking of the ship was "according to a preponderance of the evidence" due to the errors of the captain of the "Siberia"? No steamer in the world, we venture to say, could have met with an accident such as that experienced by the "Siberia" in Honolulu and *not* have been ordered drydocked. She could not retain her class otherwise (Watson, 293). And is it fair or just or equitable to say that the party whose wrong *directly caused* this drydocking should escape from paying any part of the enormous expense which it entailed? And is it correct to say that it was the fact that fragments of wire had been forced into the shaft bearings which made it necessary to dock the vessel when she would have been ordered docked irrespective of that fact? Admitting that the appellee should *share* the expense of the dockage charge, should the appellant escape entirely after making such dockage an absolute necessity according to the uncontradicted evidence in the case? We submit not.

We have shown in our brief that the *main items* in the bill for repairs in this case were for drawing

and replacing the shaft (appellee's brief, pp. 124-125). This was made necessary at least in part by the wrong of the dredge "Pacific". In fact the *only* items which can by any stretch of reasoning be said not to have been so made necessary are items 1, 2, 6, 10, 11, 12 and 13, all of which are of minor importance in comparison with the other items both as respects the work done and the time spent in doing it (as pointed out in our brief, an exact segregation of these items is possible, and it can be shown what part of the time in the drydock can be charged up to them). We, therefore, respectfully submit that to compel the appellee to bear the whole drydocking charge of $15,932.60 is to sanction an injustice, and to enable a wrongdoer to relieve himself of consequences clearly and directly caused by his own wrong. And all because of an error in judgment on the part of the captain of the "Siberia". The court's opinion lends color to the theory that it believed that the fact that fragments of wire got into the shaft bearings was what made the drydocking necessary, and overlooked the fact that it would have been necessary irrespective of such injury. If there was any such misconception it is submitted that a rehearing should be granted.

The wrong of the dredge in Honolulu harbor made necessary the drydocking of the "Siberia" and the drawing of her shaft. Shall the dredge escape ANY *payment for this direct consequence of its wrong because the later negligence of the captain of the ship* ALSO *made such docking necessary?* Such

a ruling would not be in accord with the just principles established in the admiralty for dividing damages.

Second Ground.

The court has made its finding on this point and it would be inappropriate to argue it at length. We wish, however, to call attention to a few salient facts.

This court has said that it was an "inexcusable error" for the captain of the "Siberia" to take her outside the harbor and then proceed to Yokohama instead of going back to her dock. Yet the evidence of experienced navigators and engineers in the case is to the contrary (appellee's brief, pp. 77-80), and no testimony was introduced on behalf of the dredge upon the point. The evidence is all one way and sustains the propriety of the master's course and the master himself, being dead, could not be called. If there were any conflict in the testimony on the subject, we could not quarrel with the court's judgment, but we respectfully submit that in the absence of such conflict the court should have accepted the testimony of Captain Lorenzon and Chief Engineer Hamilton to the effect that the captain took the proper course both in going outside the harbor and proceeding to Yokohama. He unquestionably exercised his best judgment in the matter. His judgment in going outside was concurred in by Captain Lorenzon, the pilot (Lorenzon, 557), and

he decided to go to Yokohama on the diver's opinion that it was safe to do so and after an investigation of conditions by Mr. Hamilton (Lyle, 614, 617, 622; Hamilton, 213, 226). *No evidence* showed that these actions were improper, but the court has simply so adjudged on *its own opinion.* With all due respect to the court, we submit that this ruling is not in line with the admiralty cases cited on pages 90 to 98 of appellee's brief. Thus in the case of The City of Macon, 121 Fed. Rep. 686, the head note reads in part as follows:

> "A steamer solely in fault for a collision with another which was grounded is liable for all the damage resulting, although a large part of it might have been avoided by a different handling of the injured vessel *after the injury was received,* where those in charge exercised their best judgment, which was concurred in by the local pilot and tugmen."

And on page 690 of the decision the court says:

> "As was said in the Magnolia, Fed. Cas. No. 8,958, 3 Am. Law Reg. 465:
>
> " 'The inquiry must be, whose fault was it that such condition existed? A party who has involved himself and others in a peril cannot be heard to complain of the want of the clearest judgment in the selection of the modes of extrication.'
>
> "The local pilot and the tugmen seemed to have concurred with the master in thinking that it would have been bad judgment to float the vessel after the collision. That this could have been done, with an hour more of flood tide, we have no reason to doubt. That these men took what they thought to be the safest course,

as each emergency arose, cannot be successfully disputed. They acted in good faith and we have looked in vain for proof of such palpable fault on their part as will release the Macon. The wound inflicted by the Macon was the proximate cause of all the damage received by the Teviotdale; but for that she would have proceeded on her journey to Hamburg.

"We have in the collision a natural and obvious cause for all the subsequent disasters which befell the Teviotdale. The court is not justified in entering the realms of conjecture for the purpose of theorizing as to what might have been the result *had the sequence of events been different after the blow was given.* The collision is sufficient to account for it all."

In addition to the foregoing we desire to refer to one of the court's findings upon a phase of this subject. The court says:

"At that time the Siberia was in a safe harbor and with the assistance of the tug and the use of her port propeller, she could have returned to her mooring at the wharf without danger of additional injury."

Yet Captain Lorenzon's testimony on this subject (and it is the only evidence in the case on the point) is as follows:

"Q. Why then would you probably not be able to use the port propeller going alongside of the wharf?

A. Because going ahead with the buoy fouled under the starboard propeller, we would be going ahead and the buoy would be trailing astern. If we had to go astern at all we would have to go over the buoy and the buoy would have a tendency to come under the ship and it is dangerous."

(Lorenzon, 568, 569.)

We have then, on this point also, uncontradicted evidence to support appellee's case, and we respectfully submit that it should not have been disregarded.

We have felt that our duty to our client demanded that we make these suggestions as to the propriety of the captain's course of conduct, but the matter was fully argued in our brief and we shall not, therefore, prolong the discussion.

Dated, San Francisco,
April 12, 1911.

E. B. McClanahan,
S. H. Derby,
Proctors for Appellee and Petitioner.

CERTIFICATE OF PROCTORS.

We, E. B. McClanahan and S. H. Derby, proctors for appellee, do hereby certify that in our judgment the foregoing petition for a rehearing is well founded and, further, that said petition is not interposed for delay.

E. B. McClanahan,
S. H. Derby,
Proctors for Appellee and Petitioner.